17924

In the

United States Court of Appeals

For the Ninth Circuit

PAUL LESSIG,
Plaintiff-Appellant,

vs.

TIDEWATER OIL COMPANY,
Defendant-Appellee.

Brief of Appellee Tidewater Oil Company

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Statement of the Case

This is an appeal by a plaintiff, Paul Lessig, from a judgment entered against him upon a jury verdict.

On November 15, 1955 (following a prior lease entered into in May, 1955), Lessig leased from Tidewater Oil Company a service station in San Francisco "subject to termination at the end of the first or any subsequent six (6) months period by either party." P. Ex. 5, para. 2.[1] Concurrently he entered into a "dealer contract" with Tidewater entitling him to buy from it his

1. The notation "P. Ex. ....." refers to plaintiff's exhibits, "C.T. ....." to the Clerk's transcript, "R. ....." to the report of oral proceedings, and "O.B. ....." to the Opening Brief of Appellant. All emphasis in quotations is supplied unless otherwise noted.

requirements of gasoline, motor oils and greases manufactured by it, so long as the lease continued, but not to exceed three years unless extended at Tidewater's option. P. Ex. 6, paras. 1, 2. In April, 1958 Lessig offered the keys to the station to Tidewater (R. 694, 695), and on the basis of the extremely poor performance of the station Tidewater exercised its right to terminate the lease and dealer contract as of May 15, 1958. P. Ex. 84.

Lessig then brought this action for damages, claiming that the lease was terminated because he would not resell gasoline at prices desired by Tidewater, and asserting that the termination therefore violated Sections 1 and 2 of the Sherman Act. To this claim he added the makeweight of two others, viz., that during the period of his occupancy he suffered damages (1) from an alleged "inability" to resell gasoline at his own prices, and (2) from an alleged "inability" to acquire tires, batteries and accessories ("TBA") from persons other than Tidewater. Complaint paras. 27(a), (b); C.T. 10.[2]

Lessig's attorney is the same counsel who represented Simpson in a similar suit before the same District Judge based on similar theories, in which this Court recently affirmed a summary judgment for the defendant. *Simpson v. Union Oil Company of California,* ..... F2d. ..... (9 Cir., Jan. 2, 1963), 1963 Trade Cases para. 70,612. This case could well have been ended by summary judgment on the same principles as this Court affirmed in *Simpson's* case. Instead, the exceedingly patient District Court denied a motion for summary judgment (C.T. 69) and let the case go to jury trial where, for nine days, plaintiff put on his case. Avoiding as long as possible any evidence about *his own* relations with Tidewater, Lessig paraded other former Tidewater dealers to testify respecting wrongs which Tidewater had allegedly

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2. Lessig's claim was stated by Plaintiff's Pretrial Statement of Issues as follows: (C.T. 45):

"8. The amount of damages suffered by reason of
(a) The lease cancellation,
(b) The exclusive arrangement on TBAs,
(c) The inability of plaintiff to set his own retail price on a free and open basis."

done *them.* The Court permitted this type of evidence on the representation that it would be connected (R. 62, 63), commenting that this "cart-before-the-horse will eventually give us the horse in the form of Mr. Lessig." R. 451. But there was no such horse, because nothing of the kind alleged had ever happened to Lessig, as became apparent when he finally took the stand. R. 595. The result was, in the language of the court, "that much of the evidence which was admitted on a theory that it would be tied into similar treatment accorded the plaintiff, should not have been admitted and would not have been admitted had the extent of Lessig's complaint been explored by examination of Lessig prior to . . . the testimony given by the various fellow dealers" (R. 904) and that "material . . . was obviously thrown in for the purpose of prejudice." R. 905.

At the close of plaintiff's case, the facts were so clear that defendant rested without adducing further evidence. The ever-patient court then submitted the cause to the jury upon a set of instructions so favorable to plaintiff that, had it returned a verdict for him, reversal would be required. Nevertheless, the jury returned a verdict for defendant. It is from the consequent judgment that plaintiff appeals. C.T. 192, 193, R. 1048.

The issues on appeal

The only issues open to an appellant from a jury verdict are these: (1) that the evidence is insufficient to support the verdict, a pretty difficult position for an appellant in most cases;[3] (2) that evidence was (a) improperly received or (b) improperly rejected; or (3) that instructions were (a) improperly given or (b) improperly refused. Sometimes a desperate appellant adds, as here, that the trial judge committed misconduct.

Here, Lessig does not claim that any evidence was improperly received. He could hardly do so since all the evidence came in on his own case in chief.

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3. See *Standard Oil Co. of California v. Moore*, 251 F2d. 188, 198 et seq. (9 Cir.).

Nor does he openly claim that the evidence does not sustain the verdict. Instead his long brief merely adverts to the verdict (O.B 8), then blandly proceeds for over 110 pages to ignore it, replete with statements unsupported by the record, and with plain mis statements thereof. Lessig's brief heaps up selected excerpts o testimony and ignores all contrary evidence, even stipulated facts It repeatedly speaks of "uncontradicted" and "undisputed" fact which Lessig's own testimony shows to be imaginary.

We shall show: *first,* that this was a sham case, and that the evidence sustains the verdict; *second,* that no evidence was im properly rejected; *third,* that there was no error in giving o refusing instructions; and, *finally,* that the claim of misconduc by the trial court is nonsensical.

Discussion

I. THE EVIDENCE SUSTAINS THE VERDICT.

Despite the great provocation, in order to keep our brief at minimum length we shall refrain from pointing out, line by line the misstatements and irrelevancies of the opening brief and shal limit ourselves to stating the matters which not only support, bu indeed compelled, the verdict.

A. On the Claim of Improper Termination of Lessig's Tenancy

The claim here is that Tidewater cancelled the lease becaus Lessig would not follow its "instructions" respecting retail price for gasoline (O.B. 10) as a consequence of which "he was unabl to retain possession of the premises . . . for the full term of hi Dealer Agreement" (Complaint para. 27c, C.T. 10) and "he wa unable to realize the 'goodwill' of the business he developed whil operating such service station during which time he increased th gallonage of said station from approximately 9,000 gallons pe month to approximately 15,000 gallons per month, to his injur and damage." Complaint, para. 27d, C.T. 10.

Even if Tidewater had terminated the lease for the reaso claimed there would have been no violation of the Sherman Act

We do not argue that submission, however,[4] because the jury found that the lease was terminated for no such reason but because Lessig was such an incompetent operator that Tidewater was making no money.

The trial court submitted Lessig's theory to the jury. Thus it instructed (R. 1008):

> "Plaintiff in this case complains that the defendant cancelled his lease and dealer contract . . . because defendant was enforcing a resale price fixing arrangement which required him to abide by the resale prices fixed by the defendant."

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4. We mention the point only because we would not wish the Court, in the absence of any statement of our position, to assume that cancellation for the claimed reason would constitute an anti-trust violation. That question can await decision in a case where it directly arises. Our contention can be compactly summarized thus:

The cancellation of the lease was in conformity with the rights specified in it. The Sherman Act denounces certain *contracts, combinations* and *conspiracies* in restraint of trade. The cancellation of a lease according to its terms is not the formation of an agreement to do anything, or the creation of a business relationship, but the opposite. A seller may lawfully terminate relations with a customer for the reason that he does not maintain desired prices. *United States v. Parke Davis & Co.,* 362 U.S. 29, 45, 46. If the relationship, while it was in existence, amounted to a resale price maintenance agreement, the Sherman Act may have *thereby* been violated. *Ibid.* But *the termination* of the relationship does not do so. If the lease were cancelled as a result of concert with others (*Poller v. Columbia Broadcasting,* 368 U.S. 464; *Klor's v. Broadway-Hale Stores,* 359 U.S. 207), or if the lessor were a monopolist (*Eastman Kodak v. Southern Photo Co.,* 273 U.S. 359, 375), different questions would be presented. But there was neither claim nor evidence of anything like that here. Absent such factors, the cancellation of a dealership does not violate the Sherman Act, although motivated by conduct of the dealer which the supplier could not lawfully restrain by agreement. E.g., *Nelson Radio & Supply Co. v. Motorola,* 200 F2d. 911 (5 Cir.); *Hudson Sales Corp. v. Waldrip,* 211 F.2d 268 (5 Cir.), cert. den. 348 U.S. 821; *Alexander v. Texas Company,* 165 F. Supp. 53, 63 (W.D. La.) As succinctly stated in *McElhenney Co. v. Western Auto Supply Co.,* 269 F2d. 332, 337 (4 Cir.):

> "Generally speaking, the right of customer selection is sanctioned by both statute and case law. Absent conspiracy or monopolization, a seller engaged in a private business may normally refuse to deal with a buyer for any reason or with no reason whatever. Thus, the courts have until now not held a seller liable in damages *for refusing to deal with one who is unwilling to enter into an unlawful vertical price agreement or an exclusive dealing arrangement.*"

By other instructions (see pp. 39-40 infra) the Court charged that such a resale price fixing arrangement would be unlawful, and further instructed that Tidewater could not utilize cancellation of leases to require adherence to its price directions. R. 1012.

The evidence showed a different story.

In May of 1955, Tidewater had an old service station, "SS 62," located at Twenty-Second and Irving Streets, San Francisco. Tidewater's deliveries of gasoline to this station since January 1, 1954 had averaged just under 10,000 gallons per month.[5] After preliminary discussions Lessig agreed to lease this station but only if Tidewater would modernize it. R. 783. Both parties shared the belief that rebuilding the station would double its gallonage. R. 783, 784; P. Ex. 87.

The lease executed in November, 1955 (P. Ex. 5) specified a rental of $67.34 per month, plus one cent for each gallon of gasoline delivered to the premises. Para. 3. Thus, unless Lessig sold volume, Tidewater's rental return on its investment in the premises would be minute. The station was rebuilt between August 14, 1955 and October 15, 1955 (R. 617) at a cost to Tidewater of $29,000. P. Ex. 86A, p. 2. As remodeled, it had additional gasoline pumps and driveways, the lubrication, wash rack, restroom and lighting facilities were better, and it was a bigger and better station in all respects. R. 753, 754.

Rebuilding caused an immediate spurt in the station's gallonage, on which the rent was based. In November, 1955, the first full month after the rebuilding was completed, Tidewater delivered 12,500 gallons. P. Ex. 106. This was an increase of only 25% in the gallonage and not the 100% anticipated. In the 27 months which ensued before Tidewater gave notice of cancellation, there was no further increase of any consequence. During 1956, Tidewater's deliveries of gasoline averaged 12,659 gallons per month, just 159 gallons per month more than the first full

5. P. Ex. 106 is stipulated (R. 855) to be a copy of a record maintained by Tidewater's District Manager showing Tidewater's deliveries of gasoline to SS 62, by months, for the eight-year period beginning January 1, 1954.

month after the rebuilding, and but a 27% increase over the volume of the old station. P. Ex. 106.

In April, 1957, Tidewater prepared an analysis of the profits it had realized during 1956 from the station. After taking into account all receipts by Tidewater from the station, i.e., all rents paid by Lessig and all profits realized on sales to him of gasoline, oils, greases, kerosene, solvent and TBA, *Tidewater's total profit for the whole of 1956 in this station in which it had just invested $29,000, was $30.38,* before taxes! P. Ex. 93. This financial disaster to Tidewater was explained to its District Manager by his subordinate in a writing dated April 23, *1957.* P. Ex. 87. He stated:

> "We were recently asked by your office to give reasons why subject service station has not increased its gallonage to the estimate since being rebuilt. . . .
>
> "The estimate of 20,000 gallons per month would seem a little high. . . . However, *with the right type of operator* this unit should attain its estimate.
>
> *"The present operator could be classified as a drifter.* He has had Shell, Standard and Richfield stations. He has somewhat of a negative attitude. He believes he is doing a good job, 13,000 or 14,000 gallons per month, and that the station will never do 20,000 gallons per month. During the most recent price war, it was difficult to get him to lower his prices to meet competition in the area even though he was receiving assistance. He was a factor in losing some gallonage. . . .
>
> * * * * * * *
>
> *"The necessary steps to our problem here would be to get a new operator. . . ."*

This appraisal of the situation, put in evidence by plaintiff himself, preceded, by almost one full year, the cancellation of Lessig's lease.

Tidewater waited patiently for improvement in the gallonage, but there was none. Deliveries in 1957 averaged only 12,923 gallons per month, a mere 2% increase over 1956. P. Ex. 106. Tidewater's profit at the station for the entire year 1957, includ-

ing its profits on all sales to Lessig, was a paltry $907 before taxes D. Ex. B. Then, during the first three months of 1958, only 36,887 gallons were delivered (P. Ex. 106), an average of 12,296 gallons per month, i.e., *even less than the station had averaged for the immediately preceding 24 months.*

Early in April, 1958, C. R. Clark, Tidewater's District Manager called at the station and had a conversation with Lessig. Lessig's brief makes not less than eight references to his version of this conversation[6] (e.g., O.B. 5, 10-12, 36, 51, 52, 82, 99, 112) but is entirely silent about its most significant aspect, viz., *Lessig offered Clark the keys to the service station.* R. 694, 695. Clark accepted this offer by sending, on April 11, 1958, the notice of cancellation authorized by the lease. P. Ex. 84. On May 15, 1958 Lessig left the station (R. 701) and surrendered whatever interest he had in it by turning over to Tidewater's representatives the keys he had previously offered Clark. R. 796.

Clark told Lessig the reason for the cancellation: "We expected 20,000 gallons out of the station and you have only been getting between twelve and thirteen thousand out of it". R. 699, 700. He wrote to an inquiring customer of Lessig (P. Ex. 86):

> "I would like to explain the situation briefly so that you may realize there there is nothing personal in any way about this change. In the first place we built a new service station approximately 2½ years ago at a considerable expenditure. Mr. Lessig took over this new station and it was anticipated that with proper operation and sufficient inventory it might be expected to considerably increase in volume over the obsolete station that was formerly there. This did not occur; in fact the gain in volume was so small as to be hardly noticeable. The matter therefore became one of strictly economics. . . . We think we are doing him a favor, because as the records show, for the past 2½ years neither of us are making any money"

To precisely the same effect are P. Ex. 86A and P. Ex. 86B.

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6. It was stipulated that Clark's physical condition precluded his attendance at the trial. R. 594.

Lessig was succeeded at the station on May 15, 1958 (R. 701) by one David L. Wells. R. 405. In contrast to Lessig, who had had prior experience operating service stations (R. 750) and who lived in the area where the station is located (R. 595), Wells had no previous experience and lived in a different part of town. R. 437, 438. Nevertheless, the gallonage of the station under Wells' operation *immediately increased.* It averaged *15,007* gallons per month during the period June 1, 1958 through December 31, 1958, the first seven full months of Wells' occupancy. P. Ex. 106. In 1959 the station averaged almost *16,000* gallons per month and in both 1960 and 1961 over *17,000* gallons per month. P. Ex. 106. In December 1959, September and December 1960, and March and June 1961, it exceeded *20,000* gallons per month. P. Ex. 106.

The jury was fully warranted in concluding that Lessig's lease was terminated because he was a poor operator, and that out of a decent business respect for its investment Tidewater had to find another operator. The jury was also warranted in concluding that one of the reasons Lessig made such a miserable showing in the sale of gasoline was that he tried to gouge the public by charging too much.

In the neighborhood of this station there were 18 others, all in business throughout the entire period involved—one Shell station, one Tidewater, one Standard, two Texaco, two Mohawk, one Union, two General Petroleum, two Rio Grande, three Chevron and three Richfield. R. 784-787. Often some of these stations undersold Lessig. P. Ex. 40, p. 13 et seq.; P. Ex. 83. In circumstances like this, Tidewater reduced its price to its dealers to enable them, if they wished, to be competitive. This was done by so-called "dealer aid," a system of price reduction in areas of low prices.[7] The amount of dealer aid in cents per gallon was deter-

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7. Area price reductions are recognized as proper under the Robinson-Patman Act. *F.T.C. v. Sun Oil Co.,* ..... U.S. ....., 1963 Trade Cases, para. 70,620. The purpose of dealer aid is shown by the following testimony of one Cristoni, a former Tidewater dealer called as a witness by plaintiff:

mined by the prevailing retail prices being charged for gasoline in the dealer's neighborhood, but the granting of dealer aid to a dealer did not depend on what he charged, for he was free to charge what he wished. Thus a Tidewater official, called as a witness by plaintiff, described the system thus:

> "What we did was to have our salesmen observe the general price situation in a given area, and when the level of the prices of our own dealers and other competitors within a given area were at a certain level, then it was our opinion that this was the general price and as a consequence we gave dealer aid to all dealers in that area in order that they would be in a position, *if they desired,* to meet such competition, whether it was up or down." (R. 532)
>
> * * * * * * *
>
> "Q. Your aid was determined on what the retail price was *in a given area,* is that correct?
>
> A. Yes, it was, Mr. Keith." (R. 535)
>
> * * * * * * *

> "Q. . . . the purpose of dealer aid was to reduce the price of gasoline to you, was it not?
>
> A. Yes.
>
> Q. So as to make it possible for you to continue in business?
>
> A. Yes." (R. 78)

Again:

> "The Court: Mr. Cristoni, from what you have said I gather . . . that the meaning of dealer aid as intended by Tidewater was to allow the dealer receiving it to meet competition which he could not meet if he were required to take the reduction out of his own pocket?
>
> The Witness: Yes." (R. 58, 59)
>
> * * * * * * *
>
> "The Court: I want to ask the witness one question. Suppose in your business a Standard station or a Union station or one of the other oil company stations across the street from your place drops the price of gasoline by, say, 5 cents a gallon below the previous price, and there were no such thing as dealer aid and [Tidewater] Associated just said, 'You're an independent dealer; you bought the gasoline; either drop your price or remain the same; that's your problem.' What would happen?
>
> The Witness: Well, I would try it, and then most likely get out.
>
> The Court: Get out of what?
>
> The Witness: Sell my business." (R. 76)

"We would observe the retail prices *in a given area.* We would determine that in order for our dealers to become competitive they would have to be given dealer aid of a certain amount in order to guarantee them a certain margin of profit. Then we would give the dealer aid, *after which it was entirely up to them the price at which they sold gasoline."* (R. 538)

* * * * * * *

"He could charge, Mr. Keith, whatever price he desired to charge. The dealer aid that we gave had no relation to what he could or could not do with respect to his selling price. This is entirely up to the dealer. Our aid was based on a situation to give him a guarantee that *if* he met the other dealers in the area that he would not make less than that amount." (R. 553-554)

* * * * * * *

"Q. And 6-1 was used when you came out with a form or schedule around November 1957 which calculated a certain amount of dealer assistance *to be based upon retail prices charged by the dealer,* would it not, Mr. Pease?

A. I remember this chart and the amount of dealer aid was based upon what we found to be *the price situation by dealers generally within the area.* Then we granted dealer [aid] based upon this chart, *but the dealer still had the right to sell at whatever price he wanted to sell gasoline for."* R. 555.

Lessig would take the dealer aid but not lower his prices to meet competition. For example, on August 30, 1956 Lessig was charging the public 31.8 cents per gallon for "regular" gasoline and 35.3 cents per gallon for "ethyl." P. Ex. 83.[8] When a survey of the neighborhood showed that other stations were charging substantially less, dealer aid of ½ cent per gallon on "regular" and 1 cent per gallon on "ethyl" was extended effective from August 31 to September 20, 1956. P. Ex. 40, p. 13. Another survey then showed that the neighborhood price level was even lower, and Lessig's dealer aid was increased to 1½ cents on

8. It is stipulated that this exhibit sets forth the prices Lessig charged for gasoline. R. 642-643.

"regular" and 2 cents on "ethyl." P. Ex. 40, p. 14. This continued from September 20 through October 24, 1956. Another survey then revealing a further decline in the neighborhood price level, Lessig's aid was again increased from October 25 to November 29, 1956 to 2½ cents on "regular" and 3 cents on "ethyl." P. Ex. 40, p. 15. The total dealer aid given Lessig for this three-month period was $753.00. P. Ex. 77, pages 6-11.

Lessig, however, did not lower his retail prices until *November 7, 1956.* P. Ex. 83. Although dealer aid began August 31, was increased September 20, and was increased again October 25, Lessig did not reduce his retail prices for 68 days. Then two weeks later, on November 21, he increased his "ethyl" price (P. Ex. 83), and on November 23 his price on both grades (Ibid.), although there was on those dates no reduction of dealer aid.

Lessig apparently preferred a high profit per gallon and small volume. The jury was warranted in concluding that this method of gouging the consumer accounted for the miserable volume he sold, and that whatever the reason for his poor volume, Tidewater cancelled the lease because Lessig was selling insufficient quantities of gasoline.

The jury verdict thus disposes of Lessig's main claim.

B. On the Makeweight Claims.

1. THE CLAIM THAT LESSIG WAS "UNABLE" TO CHARGE THE PRICES HE WANTED.

From the claim that Tidewater cancelled the lease because he in fact charged prices of his own determination, Lessig shifts to the diametrically opposite claim. He claims that Tidewater "unlawfully controlled" his retail prices for gasoline, as a consequence of which "he was unable to fix and establish his own retail price for the sale of gasoline to his injury and damage" (Complaint, para. 27a, C.T. 10), or as stated in his brief: "Appellant also seeks damages for his inability to sell gasoline at market prices of his own judgment during the period 1955 to 1958 as a result of Tidewater's unlawful control of his prices." O.B. 2.

On this claim, Tidewater was entitled to judgment as a matter of law, under the opinion of this Court affirming a summary judgment for the defendant in *Simpson v. Union Oil Company of California,* ..... F.2d ..... (9 Cir.), 1963 Trade Cas., para. 70,612. There plaintiff, a service station dealer, entered into a written contract with the defendant Union, his lessor-supplier, under which he expressly agreed to charge for gasoline the prices specified by Union.[9] Lessig's attorney and Simpson's being the same, Simpson's claim of damages was identical to the claim of Lessig now under discussion. This Court said (1963 Trade Cases at p. 77,507):

> "Simpson alleges that he was 'unable' to fix the price of gasoline from May 1956 to March 1958. The undisputed facts show he did in fact exercise the power or privilege of fixing the prices of gasoline from March 1958 to May 22, 1958. * * *
>
> "The immediate assumption one makes is that he could have pursued this course of action earlier. His action in March 1958 demonstrates that he was not 'unable' to fix prices on gasoline."
>
> * * *
>
> "[w]hen his claim is based on an alleged *inability* to change the situation and his own actions show this ability we think his claim fails." (Emphasis in the original).

But the right to judgment as a matter of law need not be discussed further, because the jury's verdict found that Lessig did set his own prices and that he was not "controlled" by Tidewater. We need review only enough of the evidence to show that the verdict is sustained.

First, the lease itself provided (P. Ex. 5, para. 10):

> "5. *Lessee may conduct Lessee's business on said premises as Lessee sees fit,* and none of the provisions of this Lease shall be construed as reserving to Lessor any right to exercise any control or management over the business or operations of Lessee. . . ."

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9. Since that was a consignment agreement, its legality was on a different plane from a resale price agreement, if there had been one here. This Court found it unnecessary in *Simpson* to pass on any question of legality.

and

> "10. . . . . This Lease embodies the entire understanding of the parties hereto, and there are no further agreements or understandings, written or oral, in effect between the parties hereto relating to the subject matter hereof; . . . ."[10]

10. The first lease, that of May 15, 1955, contained identical provisions. P. Ex. 2C, paras. 5, 10.

Lessig's claim was, of course, an attempt to impeach this agreement, the terms of which are themselves evidence sufficient to sustain the verdict.

Beyond that, the evidence dehors the agreement was overwhelming. Lessig gave no testimony whatever that he had ever agreed with Tidewater to charge gasoline prices desired by it. And, on the contrary, his own testimony showed that he set his prices *not* on the basis of any conversations with Tidewater personnel, but on what was being done at three stations he considered to be his competitors, *as determined by himself*. He testified that he had conversations from time to time with Tidewater personnel respecting his retail gasoline prices. His versions of these conversations varied and, depending on which version one accepts, Tidewater personnel merely suggested lower retail prices to him (R. 792-793),[11] or advised him that "the Tidewater policy at the present time would be to drop the present price of gasoline" (R. 682) or "told" him to lower the price. R. 790. But Lessig's version as to how he *reacted* to these communications remained constant. *He simply rejected them*. There were "five or six" occasions (R. 683) when Mr. Finn of Tidewater allegedly told Lessig that it would be Tidewater's policy to drop the present price. R. 682. And (R. 683):

> "Q. What did you say, sir?
> A. I told him no."

11. This was deposition testimony, abandoned at the trial.

Nichols and Thompson of Tidewater allegedly came to the station with a price sign they asked Lessig to post. And (R. 684):

"Q. Then what did you say, sir?

A. My answer to Mr. Nichols was, I would rather give you my right arm than put this sign up."

Coleville of Tidewater allegedly came to the station and asked Lessig why he was not passing his dealer aid ("subsidy") to his customers. And (R. 685):

"Q. What did you say, sir?

A. I said, 'What subsidy . . . I have nothing on paper to show that I am being subsidized.' "

Lessig introduced four graphs in evidence. P. Ex. 79-82. The broken lines represented the tankwagon price to Lessig, plus one cent rent (R. 635-636, 639), taken from his delivery tickets (R. 637), and the solid lines represent Lessig's own retail prices charged by him to the public. R. 641.

"Q. From what source did you take those prices, Mr. Lessig?

A. *From my competition.*" (R. 641).

This subject was further explored as follows:

"Q. Whenever Mr. Finn spoke to you about lowering your price, your retail price, whether or not you did so depended on whether or not your competitors on Irving Street were lower than you were?

A. Yes, sir.

Q. That's right. And how did you find out whether they were lower or not?

A. I would make a survey of the neighborhood.

Q. If *you* concluded from your survey that your competitors were below you, you lowered your price?

A. Yes, sir.

Q. And if *you* concluded that your competitors were not below you, you did not lower your price?

A. That's right.

Q. Now, these competitors we are talking about are specifically this Richfield station (indicating), this GP station, and this Chevron station, right? (Indicating)"

* * * * * * *

". . . those three stations . . . are the people you considered to be your competitors?

A. Yes, sir.

Q. And these stations, these three stations, were the test in your mind whether you were going to lower the price?

A. Yes, sir." (R. 794-795)

* * * * * * *

"Q. Now, when these three stations, the GP station, the Richfield station and the Chevron station, went up you went up?

A. I believe that was the policy, yes, sir.

Q. You mean *your* policy?

A. Yes, sir.

Q. *You* made that determination?

A. Yes, sir." (R. 796)

How this policy worked in practice is shown, for example, by this (R. 681):

"A. Mr. Weaver [a Tidewater representative] said that my competitor at Twenty-Fifth and Irving and at Twenty-Sixth and Irving had a posted price of 29.9 for regular and 33.4 for premium.

Q. What did you say, sir?

A. I told him I would go down and look."

Lessig's brief concedes that "it was his policy to establish his own prices." O.B. 31. The evidence more than sustained the jury's conclusion that this is exactly what he did. Indeed, Lessig's claim that his prices were "controlled" is essentially based on an argument that "dealer aid," the reduction by Tidewater of its price to dealers in times of price wars, was contingent upon the dealer charging a price desired by Tidewater. Whatever would be the legal significance if this had been so, the evidence amply sustains the conclusion of the verdict that it was not so. The subject is reviewed at pages 10-12, *supra*. Lessig's argument on the subject is an effort to confound the computation of the amount of dealer aid on the basis of prevailing price levels with the granting or withholding of dealer aid based on the retail price

actually charged by the dealer receiving aid. The jury was not led into this confusion and accepted the fact that these were two entirely separate things.

2. THE CLAIM THAT LESSIG WAS "UNABLE" TO BUY TBA FROM ANYONE BUT TIDEWATER.

Lessig's second makeweight claim is that he was "forced" to enter into an agreement with Tidewater to buy all his TBA from it, as a consequence of which "he was unable to purchase and sell for resale the automotive accessories distributed by others to his injury and damage." Complaint, para. 27b, C.T. 10.

Here, as in the case of the first makeweight claim, Tidewater was entitled to judgment as a matter of law under the principles stated in *Simpson v. Union Oil Company,* ..... F.2d ..... (9 Cir.), 1963 Trade Cases, para. 70,612. But we need not dwell on that point because the evidence overwhelmingly sustains the jury verdict that there was no agreement and no compulsion, and that Lessig bought what he wanted, when he wanted, from whom he wanted.

There was, of course, no written agreement that Lessig buy TBA from Tidewater. The written lease, as noted (*supra,* p. 13), provided that he could conduct his business as he pleased, and that there were no other agreements. The dealer contract related to the purchase and sale of *petroleum products,* and had nothing to do with TBA.[12]

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12. The dealer contract did not even require Lessig to buy petroleum products from Tidewater. It merely specified that he would buy from it his requirements of its "Flying A" gasolines and "Veedol" and "Tydol" motor oils. P. Ex. 6, para. 2. To the extent he chose to purchase these products manufactured by Tidewater he was to buy them directly from Tidewater, and not from others to whom Tidewater sold, as, for example, other service station dealers, petroleum distributors, contractors, etc. (R. 227, 228). But he was free to buy similar products from anyone else. As in the case of the lease, the dealer contract specified that it contained the entire agreement between the parties. Para. 11.

Lessig's brief (O.B. 94) cites the testimony of Mr. Brunn. What Mr. Brunn said was this (R. 150, 151):

The evidence respecting Lessig's TBA purchases is undisputed. During his seven months in the station in 1955, Lessig's purchases of TBA from all suppliers and sources totalled $2,458.71. P. Ex. 89.[13] During the same seven-month period, his purchases of TBA *from Tidewater* totalled only $1,265.00. P. Ex. 95.[14] That is, during 1955 Lessig bought only *51%* of his TBA from Tidewater. In the calendar year 1956, Lessig's total purchases of TBA were $5,319.82 (P. Ex. 90),[15] of which $1,814.00, or only *34%* was purchased from Tidewater (P. Ex. 95), and the remaining *66%* from others. During 1957, Lessig's TBA purchases totalled $6,732.03 (P. Ex. 91),[16] of which $2,537.00, or only *38%,* was bought from Tidewater. P. Ex. 95. During the first four months of 1958, Lessig's TBA purchases totalled $1,822.48 (P.

"Q. To all those classifications you had a products form which required a dealer to buy his approximate requirements of petroleum from Tidewater; is that correct?

A. *No, no.*"

* * * * * * *

"The Court: If the witness thinks he can answer that question with reasonable clarity, he may do so. If he has an objection to it, why, he can say so.

The Witness: No, I have no objection to answering it. *This contract does not provide that the dealer has to buy these quantities* . . . all you have to do is read it."

13. This exhibit includes Lessig's profit and loss statements for 1955. Under the heading "Cost of Sales," subheading "Purchases," these statements separately state his purchases of (1) gasoline, (2) oil and oil products, and (3) TBA. For the latter the figures are: three months ended August 31, 1955: $1,105.84; September, 1955: $172.54; October, 1955: $128.05; November, 1955: $648.94; December, 1955: $403.34. Total: $2,458.71.

14. It is stipulated that this exhibit accurately reflects Lessig's TBA purchases from Tidewater, taken directly from Tidewater's records. R. 720-721.

15. See the first page of this exhibit, Lessig's own profit and loss statement for the year ending December 31, 1956, under the heading "Cost of Sales," subheading "Purchases."

16. See the second page of this exhibit, Lessig's own profit and loss statement for the year ended December 31, 1957, under the heading "Cost of Sales," subheading "Purchases."

Ex. 92)[17] of which $948.00, or only *52%,* was bought from Tidewater. P. Ex. 95. This is the evidence which Lessig's brief represents to this Court as showing that he bought "small amounts" from "outside sources." O.B. 95.

The basis of Lessig's claim of an agreement between the parties respecting TBA was an alleged conversation between him and one Finn, a Tidewater employee, when Lessig took over the station. Although Lessig claimed to remember this seven-year old conversation word for word (R. 781), his testimony of what Finn is supposed to have said to him and he to Finn in reply comes in so many different versions that from that fact alone the jury could disbelieve him. Finn was supposed to have said, diversly, that Lessig would "have to" buy from Tidewater all his *tires* (R. 800-801), or all his *TBA* (R. 780), or his TBA, but nothing was said about amount (R. 677), or all his TBA *and* oil and oil products. R. 606.[18] At his deposition, Lessig testified that he said *nothing* to Finn in reply and that he "thought the man had a lot of nerve." R. 781-782. At the trial, this testimony was abandoned, and the substituted testimony was, variously, that Lessig said "yes, sir" (R. 606) or "O.K." (R. 781) or that he said " 'O.K.' or 'yes, sir' *or something of that sort.*" R. 782. The jury was obviously at liberty to reject any part or all of this testimony (*Standard Oil Company of California v. Moore,* 251 F.2d 188, 198 (9 Cir.)) and to conclude from Lessig's conduct alone that there was no exclusive dealing agreement at all.

As shown above, Lessig did not buy all, or anything close to all, his TBA from Tidewater. During his occupancy of the station his purchases of TBA totalled $16,333.04, of which only $6,564.00 or *40%* were purchases from Tidewater. As might be expected

17. This exhibit includes Lessig's profit and loss statements for 1958. Under the heading "Cost of Sales," subheading "Purchases," appear the following for TBA: January, 1958: $514.00; February, 1958: $555.29; March, 1958: $342.67; April, 1958: $410.52. Total: $1,822.48.

18. To which Lessig's brief adds yet a fifth version, unsupported by the record, that he was told that he would "have to" buy "all of his TBAs *and gasoline* and oil" from Tidewater. O.B. 31.

from these figures, Lessig was buying TBA from numerous suppliers other than Tidewater, the names of *twenty* of whom, together with Lessig's evasive testimony respecting the extent of his dealings with them, are found at R. 759-773. Indeed, his invoices reflecting purchases of TBA from persons other than Tidewater, which Lessig claimed never to have analyzed (R. 769, 770), formed a pile six or seven inches deep. R. 759.

Recognizing his inability to show an exclusive TBA agreement between *himself* and Tidewater, Lessig sought to show such agreement between Tidewater and *other* Tidewater dealers. Had the evidence showed such an agreement with others it would have been no evidence of an agreement with Lessig. Certainly it would not have compelled the jury to find the existence of an agreement between Lessig and Tidewater. But the effort to show an agreement between Tidewater and the other dealers was also a failure.

Lessig summoned as witnesses two persons in the business of calling on service stations to sell the same type of merchandise as that sold by Tidewater. Irving Auto Supply, described by Lessig as "an independent automotive parts equipment and supply business which serves the area" (O.B. 78, 79), maintained a sales force for the purpose (R. 2, 3) and supplied the Tidewater dealers (R. 23, 24) including Lessig. R. 31. Allan Squires, a salesman for Pennzoil Company, who called on all service stations (R. 95), was able to sell Pennzoil to "a substantial number" of Tidewater dealers who took "normal quantities," i.e., "what they wanted." R. 96. Lessig bought Pennzoil. R. 100, P. Ex. 30.[19] In addition, the "candy wagons"[20] called regularly in the area,

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19. Pennzoil is motor oil, not TBA, and is therefore outside the TBA damage claim. We advert to this product because in one of Lessig's versions of the alleged conversation with Finn, Finn is supposed to have told Lessig that he "had to" buy all his oil from Tidewater.

20. A "candy wagon" is "an accessory house on wheels." R. 760. As explained by Mr. Cristoni, a former dealer, "He has all these accessories in his truck . . . so he comes around and you just buy anything you need off of him." R. 85.

and Lessig did business with them. R. 760-762, 768. Even a former Tidewater dealer, John Ely, who plainly had a grudge against Tidewater, testified that he was told by Tidewater's representative only "that they *would like* to see me buy all my TBAs through the Tidewater supply house." R. 471. This is not the language of agreement, "coerced" or otherwise.

Tidewater's former Division Marketing Manager testified as follows (R. 268, 269):

> "Q. Do you know whether or not the Tidewater dealer at the time he is checked into a Tidewater station is told that he is to get his merchandise from the Tidewater warehouse or the designated consignee Mr. Brunn?
>
> A. No; he isn't told that."
>
> * * * * * * *
>
> "Q. He is not told that, what is he told?
>
> A. He is told one is available from the Tidewater warehouse and he is given reasons why it would be economic for him to do so. . . ."

It is characteristic of his disregard for the record that Lessig describes this as "undisputed evidence" that "Tidewater told the dealer upon obtaining a lease that he was to obtain his automotive accessories from the Tidewater warehouse." O.B. 26.

Another fact warranting the jury's verdict is that Tidewater's method of merchandising TBA was inconsistent with the notion that any dealer was obliged to buy. Prizes, discounts, credit plans and free merchandise were offered in profusion.[21] By way of a single example, if a dealer bought tires from Tidewater under the "Spring Dating Program" he received, in addition to his regular discounts off the dealer price sheet, further discounts ranging up to 7%, and in addition obtained deferred payment terms, without interest, under which the total price was payable in three equal installments 90, 120 and 150 days after delivery.

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21. D. Ex. A is a group of TBA circulars sent to Tidewater dealers reflecting special incentive promotions. R. 366-369. In addition to these special promotions, regular discounts off the dealer price sheets were extended. E.g., R. 344-348, 388.

R. 348-350. In addition, all TBA merchandise bought by a dealer from Tidewater was returnable by the dealer either for cash or for credit at his full cost. R. 387, 388. Lessig himself returned such merchandise.[22] How absurd it would have been for Tidewater to extend these discounts and privileges as sales persuasion to dealers to patronize Tidewater if they were under compulsion to purchase by exclusive dealing agreements.

The best summary of this aspect of the case is found in a single answer of Lessig (R. 787-788):

> "Q. Is it fair to summarize this TBA situation, Mr. Lessig, by saying that you tried to give Tidewater all the breaks you could?
>
> A. Yes, sir."

This is not the language of a man "forced" to buy all his TBA under an exclusive dealing arrangement, but the language of a man dispensing favors.

C. On Lack of Any Damages.

Not only was the jury warranted in finding no violation of law, but the evidence also sustains its verdict that Lessig suffered no damages.

We need not here rely on the settled distinction between the quantum of evidence a plaintiff must adduce in an antitrust case to show the *fact* of damage and the lesser quantum needed to go to the jury on *amount* of damage. See *Flintkote Company v. Lysfjord,* 246 F.2d 368, 392 (9 Cir.), cert. den. 355 U.S. 835. If we were here on a summary judgment or on a directed verdict that would be a relevant matter.[23] Here the trial court gave the issue

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22. P. Ex. 78 is a Tidewater record showing cumulatively, by months, Lessig's TBA purchases. Reference to the form dated July, 1957 shows eight batteries bought through that month. The August, 1957 form shows by a circled numeral one, the return of a battery, reducing cumulative purchases to seven. The same forms show another battery returned in October, 1957 and two returned in December, 1957.

23. The trial court denied Tidewater's motion for a summary judgment (C.T. 69) and for a directed verdict. R. 906, 907, 913.

to the jury, and its verdict necessarily found that no damage was sustained at all.

1. LACK OF DAMAGES RESULTING FROM CANCELLATION OF THE LEASE.

Lessig claimed damages on the assumption that he had a term expiring November 14, *1960.* But he did not have. By its provisions, the lease was terminable on May 15, 1958, when it was cancelled. The dealer contract (P. Ex. 6) expired November 14, *1958,* or earlier if the lease ended earlier, and the extension to November 14, 1960 was to be only at *Tidewater's* option, not Lessig's.[24] But aside from these facts, the jury had before it the following evidence.

During his occupancy of the station, Lessig's profits averaged $284.33 per month. P. Ex. 107; R. 863.[25] His own witness, Dr. Vance, testified that in his opinion if Lessig had remained at the station he would earn no more. R. 862-863. He left the station May 15, 1958 (R. 701), immediately obtained employment from one Nelson, to which he could go as soon as he wished (R. 757), and he actually went to work at the end of May. R. 755. For the seven months of 1958 that he worked for Nelson he was paid $2,550 (R. 757),[26] an average of *$364.30* per month, being $80 per month *more* than he had made at the station. C. R. Clark's prediction that in cancelling the lease Tidewater was doing Lessig a favor was therefore accurate (see p. 8 *supra.*)

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24. The dealer contract provided (P. Ex. 6):

"1. TERM. The period of this Agreement shall be from the 15th day of November, 1955, to the 14th day of November *1958,* Seller [i.e. *Tidewater*] to have the option to extend said period to November 14th, 1960. ... If Dealer occupies the above premises under a lease from Seller, then in that event, notwithstanding anything herein to the contrary, *this contract shall terminate automatically upon any termination of said lease."*

25. This figure is readily derivable by totalling the annual profits appearing in P. Exs. 89-92 and dividing the total by the number of months of Lessig's occupancy.

26. And see D. Ex. C, a copy of Lessig's federal income tax return for 1958.

If these facts did not compel, they certainly warranted the jury in finding that Lessig could make as much or more elsewhere than in running the Tidewater station and therefore suffered no monetary damage.

2. LACK OF DAMAGES FROM THE MAKEWEIGHT CLAIMS.

(a). From Alleged "Inability" to Determine His Own Gasoline Prices.

The profit one makes on the sales of goods depends not only on the selling price but on the volume of sales. Higher price may mean lower volume, and therefore either no greater profit or even less. Lessig's own testimony is that he watched the prices of three competitors and charged no more than they charged. The evidence showed that he often charged more than other stations in the neighborhood, and his volume remained low. *Supra,* pp. 6-9. There is no evidence that *on even a single day* Lessig wished to charge prices other than those in fact charged, much less that different prices would have resulted in increased profits. All these facts warranted the jury's conclusion that Lessig would not have charged more on gasoline than he did without reducing volume of sale, and that with reduced volume his profit would have been less, not more.

(b). From Alleged "Inability" to Buy TBA Elsewhere.

Assuming that Lessig operated under some limitation about buying TBA from sources other than Tidewater, whether he would have made more profit had he bought more TBA elsewhere than he did would depend on a number of factors: for example, how comparable a product could he have obtained elsewhere, could he have bought at the same price as the Tidewater item, or if he bought at the same price would this product command a greater price on resale than the like product obtainable from Tidewater. Lessig offered no evidence on these essential questions. Net profits, in short, are a function of acquisition cost, resale price, salability, and the cost of doing business. But there is not a single item of TBA as to which there was any evidence compar-

ing either the profits obtainable by handling a brand sold by Tidewater with the profits obtainable on another brand, or comparing the salability of the brands sold by Tidewater with the salability of other brands.[27] Lessig's brief asserts that he could buy other TBA cheaper. O.B. 32. If true, this would be irrelevant standing alone. But with one exception noted below, there is no evidence of its truth. Lessig's testimony was that he had compared TBA catalogs published by others with *price sheets* furnished by Tidewater, and that in some instances these other catalogs listed prices for other brands lower than the prices for brands *shown in Tidewater's price sheets*. R. 725, lines 6-11; R. 728-732. But the prices shown in Tidewater's sheets were *not* the prices the dealer actually paid, since prices to dealers were reduced by numerous regular and special discounts off list. *Supra,* p. 21. The one instance where there was evidence of lower acquisition cost is Lessig's testimony that "Auto Lux", "Amp King" and "Nic-L-Silver" batteries were cheaper than Tidewater batteries. *But he bought these batteries* (R. 726, 768, 770, 772), thus realizing whatever benefits, if any, their lower price afforded. Even here, he offered no evidence that lower acquisition cost resulted in any greater *profit,* for Lessig offered no evidence that a battery costing less did not have to be resold for less. This record patently warranted the jury in finding, as it did, that there was no damage.

II. NO EVIDENCE WAS IMPROPERLY EXCLUDED.

The flimsy nature of Lessig's case has been shown. The next question is whether a toehold for reversal can be found in exclusion of evidence.[28]

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27. Contrast *Richfield Oil Corp. v. Karseal Corp.*, 271 F.2d 709, 714 (9 Cir.):

> ". . . plaintiff offered proof . . . that 'Wax Seal' sold on the free market, as well or in many instances 3 to 7 times better than a product known as 'Mac's', and that Mac's was generally a comparable product."

28. As already noted (p. 3) *supra,* there is no claim that any evidence was improperly admitted.

A. On the Reasons for Cancellation of the Lease.

Lessig does not claim any improper rejection of evidence on this issue.

B. On the Makeweight Claims.

1. ON THE CLAIM THAT LESSIG WAS "UNABLE" TO BUY TBA FROM OTHERS.

On this issue Lessig scours the record for error and produces just two pieces of paper (P. Ex. 23, 24) he claims were improperly excluded (O.B. 79)—two credit invoices issued by Irving Auto Supply each dated March 31, *1961*—i.e., approximately 3 years *after* Lessig left—issued to one Anderson who was then operating the station. Evidence of something occurring 3 years after the events of the case and between two other persons would in any event be too remote and irrelevant. But, in addition, the proffered papers were both *meaningless and cumulative*. Mr. Hurley, of Irving Auto Supply, testified that Anderson had purchased brake shoes from Hurley's company (R. 10) and returned them. R. 13. The excluded exhibits simply reflected this transaction and no more. Offered in evidence to prove that Anderson "was required by the Tidewater Oil Company to return brake shoes" (R. 61), they contain no such evidence. As stated by Lessig: "Exhibits 23 and 24 simply show credits given on the purchase of brakeshoes." O.B. 79. They do not show *why* Anderson returned the brake shoes but simply that he did so, thus adding nothing to Mr. Hurley's testimony respecting their return. Although Anderson was alive (R. 9), he was not called as a witness to explain why he made the return, and no effort was made to connect the proffered evidence with this case.[29]

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29. Cf. R. 62:

"Mr. Keith: I submit, Your Honor, that we are going to connect the practices with respect to Mr. Anderson with the practices of Mr. Lessig while he was there.

The Court: When that is established the two exhibits that you have referred to will be admitted in evidence."

Nothing more happened.

2. ON THE CLAIM THAT LESSIG WAS "UNABLE" TO SET HIS OWN PRICES FOR GASOLINE.

Here the claim of error in the exclusion of evidence is made as to three matters. Yet one was purely cumulative, and the other two relate to other people and to events occurring years after the facts of this case.

The first is paragraph 3 of P. Ex. 10. That exhibit shows that discounts were given by Tidewater to various classes of gasoline purchasers. Lessig complains that by excluding paragraph 3 he was precluded from showing that dealers received no "discounts." O.B. 77. But whatever the paper would show is already in evidence. As stated by counsel below in respect of this exhibit (R. 278):

> "Mr. Keith: The matters set forth are in evidence.
> The Court: The matters are in evidence, but the document itself is not in evidence.
> Mr. Keith: That is clear."

And the court repeatedly advised counsel that he could ask any question that he wished concerning this exhibit. R. 165, 277.[30]

Lessig next complains of the exclusion of P. Exs. 73, 74. These were dealer aid forms dated May 10, *1960* and August 17, *1960*—two years and more after Lessig left the station. Moreover, they related to a Tidewater station located in *Oakland* and operated by the witness Ely (R. 491), who refused to pay his station rental (R. 465-466) and was evicted by a judgment of the Superior Court. R. 511. Ely was permitted to testify in detail to his conversations with Tidewater employees about retail prices of gasoline and dealer aid. R. 473-483; 486, 487, 496, 512-516. The

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30. In any event there is no relevance to the subject. Tidewater's pricing of gasoline to dealers was the subject of extensive testimony and numerous exhibits, the gist of which was that dealers paid the tankwagon price and, when price wars broke out, received dealer aid, which was simply a discount. R. 58, 59, 78, 157, 205, 635-637; P. Exs. 35-37, 77. Lessig's alleged grievance with respect to gasoline prices is not that dealers received no "discounts" but the very reverse, resting on the fact that dealers received "dealer aid". The fact that purchasers other than dealers received discounts was testified (E.g., R. 227, 229), and stipulated. (R. 279)

excluded exhibits related to two specific transactions and were excluded because they "are so remote both in time and location as to render them inadmissible." R. 522. This ruling is palpably correct. The question in the case was not *Ely's* arrangement with Tidewater, but *Lessig's*. The trial court was exceptionally lenient with Lessig's counsel and the bulk of the record is due to the persistent attempts to try every case except Lessig's. A line had to be drawn somewhere. Whether a specific transaction with another dealer in another city long after the fact was sufficiently probative to warrant further expanding the record was a question for the trial court's discretion, as Lessig's citations (O.B. 121) demonstrate. *Potlatch Lumber Co. v. Anderson,* 199 Fed. 742, 748 (9 Cir.); II Wigmore on Evidence, § 437, p. 417 (3rd ed. 1940). As stated in *Kennon v. Gilmer,* 131 U.S. 22, 25, cited by this Court in the *Potlatch* case:

> "The length of time afterwards to which such evidence may extend is largely within the discretion of the judge presiding at the trial."[31]

Lessig's third and last complaint respecting the exclusion of evidence is even more remote. O.B. 79, 122. It relates to an alleged conversation between Ely and a Tidewater representative at an even later date in January *1961*. R. 497. The court excluded Ely's testimony that he was told that Tidewater had settled Lessig's case for $75. R. 498. On what basis this could be relevant it is impossible to see. Lessig argues that it is evidence of Tidewater's alleged "intent to control retail prices". O.B. 123. Plainly the testimony was irrelevant, and the sole purpose of eliciting it was to inflame the jury by suggesting that a Tidewater employee had lied to a dealer.

Such is the triviality of Lessig's claim that evidence was improperly excluded.

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31. In *Wood v. United States,* 41 U.S. 341, cited by Lessig, defendant had made 29 importations during the years 1839 and 1840, some before and some after the four importations with which he was charged. 41 U.S. at 345. The question was one of fraudulent intent, where similar conduct is always admissible.

C. On Damages.

1. WITH RESPECT TO CANCELLATION OF THE LEASE.

Lessig's complaint here is the exclusion of Exhibits 107, 108, 109, 110, 111 and 112.

Exhibits 107 and 108.

These were merely cumulative. A Dr. Vance was called by Lessig as a witness and gave his opinion respecting Lessig's alleged loss of earnings as well as his opinion respecting the capitalized value of future earnings. R. 862, 876. P. Ex. 107 and 108 were prepared by Vance and contained the same material, in written form, as the testimony, no more,[32] other than that the exhibits were argumentative. P. Ex. 107, for example, stated, *as if a fact,* that Lessig's dealer contract had 2 years and 6 months left to run at the time the lease was cancelled, while P. Ex. 108 stated, *as if a fact,* that the gallonage of the station had increased by 6,000 gallons per month under Lessig's management and that this increase was due to Lessig's efforts rather than to the rebuilding of the station and Tidewater's investment. The *facts* of these matters were already in the record and Vance was not qualified to give factual evidence about them. Vance's *opinion* based on his assumptions, *is in the record* through his oral testimony. Lessig's counsel recognized that "the actual conclusions of Dr. Vance" were in the record. R. 894. The trial judge advised that any and all figures in the two exhibits could be used in argument to the jury (Ibid.), and they were so used. R. 982, 983. Thus, Lessig's present grievance is that he was entitled to have the same testimony placed before the jury twice, once when given orally and again in an argumentative document written by the witness.

Exhibits 109 and 110.

These compared Lessig's earnings with the average earnings of all *employees* of Tidewater. How that could possibly be rele-

32. The same is true of the repetitive examination of Dr. Vance about which Lessig complains at O.B. 75, 76, which the witness himself said called for just the same answer he had already given. R. 868.

vant is a mystery. Nevertheless, all the evidence is already in the record. The earnings of Tidewater employees were conceded to be in the record (R. 890), since they are contained in Tidewater's annual stockholder reports.[33] Everything was thus available to Lessig to "argue them for what they are worth." R. 894.

Exhibits 111 and 112.

These were plainly inadmissible. P. Ex. 111 purports to show the average income of service station operators in the United States! R. 882. It does not purport to reflect any facts within the knowledge of any witness but was said to be based on a Dun & Bradstreet survey, which was not produced. R. 882. It was thus hearsay on hearsay. It was also irrelevant. There is no such thing as an "average" service station. As this Court judicially knows, service stations are large and small, well run and badly run, favorably and unfavorably located. If as a basis of arguing what profits he lost Lessig wished to compare his profits with those of other stations, there were many others within a few blocks of his station. But he offered no figures about them.

P. Ex. 112 purports to show the mean and median income per person *of everyone in the United States,* said to be based on a publication of the U. S. Department of Commerce which was not produced. R. 883. Like P. Ex. 111, this is both hearsay several times removed and even more irrelevant.

2. WITH RESPECT TO THE MAKEWEIGHT CLAIMS.

As a matter of law Lessig sustained no damage (*Simpson v. Union Oil Co.,* ..... F.2d ..... (9 Cir.), 1963 Trade Cases, para. 70,612, p. 77,507) and no witnesses' conjectures or opinions could alter that legal conclusion. But even apart from that fact there was no error.

Lessig's grievance (O.B. 70-74) is that the Court did not permit him to answer five questions, the nature of which is such that we cannot separate discussion between the claim that he was "un-

33. P. Ex. 12, p. 13; P. Ex. 13, p. 15; P. Ex. 14, p. 16; P. Ex. 15, p. 15.

able" to set his own gasoline prices and the different claim that he was "unable" to buy TBA where he wished. The questions commingled everything. Thus the first incredible question of the series was (R. 734):

> ". . . can you state, based upon your experiences as a gasoline retailer, whether or not absent the practices you have described heretofore of the Tidewater Oil Company you would have achieved substantially more profits in the year 1955."

The question was bad for numerous reasons.

First, it was vague. The reference to the "practices" of Tidewater singled out nothing specific. The jury could not know what "practices" the witness had in mind in any answer he might give, and it would have been impossible for the jury to relate any answer of the witness to any specific facts to which the jury might attach legality or illegality.

Second, the question called for an opinion in a vacuum. Questions calling for expert opinion should include all material undisputed facts, "must be based on *facts* in evidence" and it lies in the discretion of the trial judge to determine whether a question should be reframed. *Standard Oil Company of California v. Moore,* 251 F.2d 188, 220 (9 Cir.). Here the trial court explicitly advised Lessig's counsel that he needed a better predicate, saying (R. 775):

> "The ruling was predicated upon the conclusion that the record does not offer enough, if any, material upon which a valid opinion could be predicated, and therefore any opinion as to a dollar loss *at this time, at least,* would be so conjectural and speculative as to be wholly without probative value."

Again (R. 778):

> "Mr. Keith. . . . I was precluded in my questioning of Mr. Lessig. . . .
>
> The Court: You weren't precluded from showing what the normal profit from the various factors which go into the

> matter of the profit in the operation of a service station generally; *it was the absence of any such foundation* which led to the ruling that you just mentioned."

But counsel never sought to lay such a foundation, and never returned to the subject again.

Before a plaintiff may express an opinion respecting the amount of his alleged damages, there must be specific evidence which would permit a jury to find that plaintiff's estimate was based upon *facts* which would supply some *rational basis* for approximating an amount. The record must, as this Court has put it, show "the factual basis upon which they rest their conclusions." *Flintkote v. Lysfjord,* 246 F.2d 368, 394 (9 Cir.), cert. den. 355 U.S. 835. See also *Baush Machine Tool Co. v. Aluminum Co. of America,* 79 F.2d 217, 227 (2 Cir.); *Momand v. Universal Film Exchanges,* 172 F.2d 37, 43 (2 Cir.); *Central Coal & Coke Co. v. Hartman,* 111 Fed. 96 (8 Cir.).

The answer Lessig would have given, if he had been permitted to answer, was shown by an offer of proof. It was simply that he "would have estimated that his earnings and profits would have approximated approximately $700 per month." R. 775. But neither the offer of proof nor the record gives any clue as to how this amount, or any other amount, could be reached. This was simply an attempt to pull a figure out of the air. But as held in *Central Coal & Coke Co. v. Hartman,* 111 Fed. 96, 102 (8 Cir.):

> "Litigants cannot be permitted to estimate the money out of the coffers of their opponents in this reckless way."

Having asked the foregoing highly improper question, counsel persisted in repeating it with variations of language so slight as to make no change in substance. Thus he asked (R. 747):

> "Q. Mr. Lessig, state whether or not you could have increased your sales and profits but for the policies and practices of the Tidewater Oil Company during the period 195[illegible] to 1958 with respect to your handling of competitive tires and batteries and accessories."

And (R. 747):

> "Q. State whether or not, Mr. Lessig, you could have increased your profits and earnings but for the practices and policies of the Tidewater Oil Company with respect to a high tank wagon dealer aid kind of price procedure."

While these sallies at the same question modify the generality of the all-exclusive "practices," the first by reference to TBA and the second by reference to "a high tank wagon dealer aid kind of price procedure," they broaden the question by the inclusion of "policies," an undefined term; and the references to TBA and "a high tank wagon dealer aid kind of price procedure" leave the question just as vague as before. The jury still could not know what "practices" or "policies" the witness had in mind in any answer that he might give, and could not relate any answer he might give to any specific facts to which it might attach illegality.

Moreover, these questions, like the first, called for an opinion in a vacuum. We have shown that Lessig was already buying 60% of his TBA from others (*supra,* pp. 18-19), and that there was no factual basis for a conclusion that additional such purchases would have resulted in greater profits to him. *Supra,* pp. 24-25. There was no evidence that anyone's gasoline price was lower than Tidewater's,[34] no evidence that Lessig could have bought gasoline cheaper than he did, no claim made in the Complaint or Pretrial Statement of Contentions that he wished to buy gasoline elsewhere, or that he ever tried to do so. Nor was there any evidence that dealer aid deprived him of anything. On the

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34. The Court may judge for itself just how "high" Tidewater's tank wagon prices were. On November 1, 1956, Tidewater's San Francisco tank wagon prices in cents per gallon were 25.9 for "regular" and 28.9 for "ethyl," of which 9 cents was tax, yielding ex tax prices of 16.9 and 19.9. P. Ex. 35, p. 5. Tidewater's costs in cents per gallon were 11.4 for "regular" and 12.7 for "ethyl" (P. Ex. 93, lines 9 and 11(b); P. Ex. 94), leaving a *gross* profit of 5.5 and 7.2. Out of this Tidewater was giving Lessig dealer aid of 2.5 and 3.0 (P. Ex. 40, p. 15), reducing Tidewater's gross margins to 3.0 and 4.2. Meanwhile, Lessig was selling this gasoline for 31.8 and 35.3 (P. Ex. 83), thus realizing 5.9 and 6.4 over tank wagon *plus* his dealer aid, a total of 8.4 and 9.4—as compared to Tidewater's 3.0 and 4.2.

contrary, the evidence is that *dealer aid put a total of $1,764.40 in his pocket!* P. Ex. 77.

The last question being ruled bad, counsel simply asked it all over again, this time making it even more vague (R. 748):

> "State whether or not but for the conversations that you have heretofore testified to with respect—with Tidewater representatives during the period 1955 and 1958 and the impact of the practices of high tank wagon selling and dealer aid procedure you would have increased your earnings and profits at the service station at Twenty-Second and Irving during the period 1955 to 1958."

The reference to the conversations Lessig was supposed to have had with any Tidewater representatives throughout a period of 3 years simply made the question more incomprehensible. Instead of taking advantage of the Court's suggestion that he put in the record some *factual* foundation from which some intelligent appraisal of damages might be made, counsel persisted in an even more inexcusable question as follows (R. 747-748):

> "State whether or not you could have increased your earnings and profits during the period '55 to '58 while you were a Tidewater dealer but for the control of your business by the Tidewater Oil Company as established by their requirements as to TBA's, with respect to credit cards, inspection of the premises and their check-in policies, their two teaming, in bringing unordered TBA merchandise on your premises, the procedure at check outs—"

Not only did this question possess the same defects of vagueness and calling for an opinion in a vacuum, but it assumed the conclusion that "control of your business" by Tidewater was "established."

III. THERE WAS NO ERROR IN CHARGING THE JURY.

"With the hindsight so characteristic of many appellants, the plaintiff below now vigorously attacks the instructions of the District Court." *Persons v. Gerlinger Carrier Company,* 227 F.2d 337, 338 (9 Cir.). This attack is captious and churlish in view of

the highly favorable instructions given Lessig—so favorable that defendant could have justly complained if the verdict had gone the other way.

Lessig's brief complains of *11* instructions given as well as of *10* instructions proposed by him and not given.[35] Of the 10 instructions refused, 7 were already covered by the court's charge and 3 were improper. Of the 11 instructions given and now protested, only *2* were objected to on the ground of an erroneous statement of law. The objections, if any, to the other 9 were, diversely, that the instruction was unnecessary, correct as far as it went but incomplete, unclear or not based on any evidence. And in the case of most of these instructions, the grounds argued in Lessig's brief were not raised below.

Lessig simply ignores the rules governing appellate review of claims of error respecting the charge to the jury. A brief review of these rules is therefore in order; hereafter, we shall refer to them by reference.

1. Fed. R. Civ. P., Rule 51 provides:

> "No party may assign as error the giving or failure to give an instruction unless he objects thereto . . . stating *distinctly* the matter to which he objects *and the grounds of his objection.*"

As stated in *Bertrand v. Southern Pacific Company,* 282 F.2d 569, 572 (9 Cir.):

> "These procedures are not mere technicalities. Rule 51 is designed to bring possible errors to light while there is still time to correct them without entailing the cost, delay and expenditure of judicial resources occasioned by retrials."

From Rule 51 three principles immediately emerge:

1a. An instruction to which no objection is made is not open to review. *Bertrand v. Southern Pacific Company, supra; Siebrand v. Gossnell,* 234 F.2d 81, 96 (9 Cir.);

35. Exclusive of the monopoly instructions which we discuss separately at pp. 65-66, *infra.*

Persons v. Gerlinger Carrier Company, 227 F.2d 337, 342-343 (9 Cir.).

1b. An objection which states no grounds is a nullity. *Richfield Oil Corporation v. Karseal Corporation,* 271 F.2d 709, 718-722 (9 Cir.), *cert. den.,* 361 U.S. 961; *Brown v. Chapman,* 304 F.2d 149, 154 (9 Cir.); *Husky Refining Co. v. Barnes,* 119 F.2d 715, 717 (9 Cir.).

1c. A ground of objection not stated below cannot be assigned as error. *Southern Pacific Company v. Villarruel,* 307 F.2d 414, 415 (9 Cir.); *Hargrave v. Wellman,* 276 F.2d 948, 950 (9 Cir.); *Christensen v. Trotter,* 171 F.2d 66, 68 (9 Cir).

Additionally:

2. A trial court is not required to charge in the precise language that counsel wishes to put in the court's mouth. *Herzog v. United States,* 226 F.2d 561, 565-566 (9 Cir.), *rehr.* 235 F.2d 664 (9 Cir.), *cert. den.,* 352 U.S. 844; *Southern Pacific Company v. Guthrie,* 180 F.2d 295, 301 (9 Cir.), *cert. den.,* 341 U.S. 904; *Henderson v. United States,* 218 F.2d 14, 18 (6 Cir.), *cert. den.,* 349 U.S. 920; *Alexander v. Krauer Bros. Freight Lines, Inc.,* 273 F.2d 373, 375 (2 Cir.).

3. A trial court is not required to separate good from bad in a requested instruction (*Sweeney v. Erving,* 228 U.S. 233, 238; *Miles v. Lavender,* 10 F.2d 450, 455 (9 Cir.); *Chicago G.W.R. Co. v. Robinson,* 101 F.2d 994, 999 (8 Cir.), *cert. den.,* 307 U.S. 640), and before a refusal can constitute error the proffered instructions "must be accurate in every respect" (*Southern Railway Company v. Jones,* 228 F.2d 203, 213 (6 Cir.)) "in the very language requested." *Carpenter v. Connecticut Life Ins. Co.,* 68 F.2d 69, 72 (10 Cir.)

4. Instructions which assume, as uncontroverted, facts in dispute, are improper and rightly refused. *Insurance Co. v. Foley,* 105 U.S. 350, 353; *Carpenter v. Connecticut Gen-*

eral Life Ins. Co., supra; Pennsylvania R. Co. v. Ackerson, 183 F.2d 662, 667 (6 Cir.).

5. A litigant desiring further instructions must tender them in writing to the trial court and request that they be given. Failing to do so, he may not question the absence of such instructions. *Panther Oil & Grease Manufacturing Co. v. Segerstrom,* 224 F.2d 216, 218 (9 Cir.); *Goodman v. United States,* 273 F.2d 853, 856 (8 Cir.); *Comins v. Scrivener,* 214 F.2d 810, 815 (10 Cir.); *Metropolitan Life Ins. Co. v. Talbot,* 205 F.2d 529, 533 (5 Cir.).

Tidewater served and filed its basic set of requested instructions on February 1, 1962 (C.T. 74) almost *six weeks* before the jury was instructed. R. 986, 994. Five days before the jury was instructed Tidewater tendered four additional instructions (R. 901, 915) which were given (24A, 28A, 28B and 28D) and which Lessig seeks to attack here. Also five days before the jury was instructed, there was a conference in chambers in which the Court reviewed requested instructions with counsel and gave its preliminary views. R. 915-961. Lessig therefore had ample opportunity to tender any instructions he deemed necessary to clarify or augment.

We turn now to the individual instructions.

A. Relating to the Claim of Cancellation of the Lease.

It is not claimed that any instructions pertinent to this issue were improperly refused.

The sole claim here is that instruction 40 (C.T. 123, R. 1020, lines 8-16) should not have been given. This advised the jury that Lessig did not contend that Tidewater cancelled the lease for his failure to buy substantial quantities of TBA from it. This is, of course, a *correct* statement of Lessig's contention. Lessig's complaint alleged that the reason for cancellation of the lease was that he would not abide by Tidewater's retail price directions. O.B. 110. This claim was reasserted in Lessig's Pretrial Statement

of Contentions. C.T. 59, lines 14-16. And at the pretrial conference Lessig's counsel, after some ruminations on the subject (C.T. 64-67), came to rest on the claim that the cancellation was the result of failure to maintain gasoline prices. C.T. 68.

The only objection made to instruction 40 at the time it was given *admitted* that it was a correct statement of the fact. The objection was simply that it "unduly emphasizes something I am *not* directly complaining about." R. 1037. A court but does its duty when it tries to clarify a case for the jury; the office of instructions is not only to state the law but "to apprize the jury of the questions involved". *Terminal R. Ass'n of St. Louis v. Howell,* 165 F.2d 135, 139 (8 Cir.). This office is one that anti-trust cases particularly demand be discharged in view of their sprawling nature. Here Lessig had asserted one particular specific reason for the cancellation of his lease and adhered to that contention through pretrial. Nevertheless, in his argument to the jury at the close of the case, he began to make insinuations, in a hit-and-run manner (E.g., R. 976, 979, 980), which was highly improper. *Tingley v. Times Mirror,* 151 Cal. 1, 28, 89 Pac. 1097, 1108. It was the trial judge's duty to give instruction 40 so as to inform the jury of the real issue.

B. Relative to the Makeweight Claims.

Since a summary judgment on the makeweight claims would have been warranted under *Simpson v. Union Oil Co.,* ..... F.2d ..... (9 Cir.), 1963 Trade Cases, para. 70,612, a discussion of instructions could be omitted. We shall, however, show the frivolity of these claims too.

1. ON THE CLAIM THAT LESSIG WAS "UNABLE" TO SET HIS OWN PRICE FOR GASOLINE.

Here Lessig complains of the refusal of five instructions, Nos. 7, 8, 8A, 8B and 8E, and of the giving of three others, Nos. 15, 24 and 24A.

As the trial judge was not required to charge in the precise language counsel wished to put in the court's mouth (*supra*, p. 36, ¶ 2), we first note how fully the jury was instructed respecting Lessig's contentions, and how the instructions given were far more favorable to him than the law.

Lessig's theories were amply stated to the jury, thus (R. 1009):

> "He claims that during the period he was at 22nd and Irving Street he was required to charge retail prices enforced by defendant because of the tank wagon dealer aid system of pricing and the methods used by defendant to control retail prices."
>
> * * * * * * *
>
> "Plaintiff also claims that defendant intended to gain complete control over the business of lessees or dealers of Tidewater products so as to prevent the free exercise of business judgments by these dealers and gain thereby control of prices and power to exclude."

The jury was also instructed that the case involved charges of violations of the antitrust laws (R. 1007), and that the purpose of the antitrust laws was to preserve our system of free, competitive enterprise and competition in the market place. R. 1008. After noting that the action was brought under the Sherman and Clayton Acts (R. 1005), the court instructed that under Section 1 of the Sherman Act "every contract, combination or conspiracy in restraint of trade or commerce is illegal" (R. 1006), and specifically (R. 1008):

> "Thus, any interference by contract, or combination, or conspiracy, with the ordinary and usual competitive price system of the open market constitutes an unreasonable restraint of trade, and is in itself unlawful. The mere fact that there may be business justifications for the fixing of prices, or the fact that the wholly or partially fixed prices may be reasonable, will not relieve one guilty of such action from liability under the antitrust laws."

The jury was then instructed that Tidewater "could not lawfully superimpose on its leases limitations which require adherence to

price directions" (R. 1012), that it "could not utilize cancellation of leases to . . . require adherence to its price directions" (R. 1012) and (R. 1013):

> "Restraint of trade condemned by the Sherman Act is established when it is shown that a manufacturer or distributor *attempts to control prices* charged to the public after it has sold a product to its resellers."

By this instruction the Court read out of the Sherman Act the essential element of agreement, and instructed the jury that they might hold Tidewater liable to Lessig if it merely "attempted to control prices". With this, which goes far beyond what he was entitled to, Lessig's present complaints are indeed captious.

(a) No Error Was Committed in Refusing Requested Instructions 7, 8, 8A, 8B and 8E.

Requested Instruction 7 (C.T. 166): The substance of this instruction was amply covered by the charge actually given. Lessig is merely complaining because he could not put his argumentative and virtually unintelligible language in the trial court's mouth *Supra,* p. 36, ¶ 2. Moreover, no ground was specified by Lessig in his objection to the court's failure to give instruction 7 (R. 1040) and there is therefore nothing to review. *Supra,* p. 36, ¶ 1b.

Requested Instruction 8 (C.T. 170-171): What has been said of instruction 7 applies equally to instruction 8. Lessig now argues that the Court should have given that portion of instruction 8 which referred to inferring agreements from a course of dealings O.B. 90. But there was no objection at all to the failure to give instruction 8. *Supra,* p. 35, ¶ 1a. Lessig did not even request that *any specific portion* of the instruction be given. He objected "to the failure of the Court to give *an* instruction" (R. 1040 lines 15-16) and requested that "the Court give the jury language *similar* to this in instruction No. 8A."[36] (R. 1041, lines 7-8). This does not constitute the required tender of an instruc

36. The reference, presumably was not to Instruction 8A, but to subparagraph (a) of instruction 8.

tion. *Supra*, p. 37, ¶ 5. Furthermore, the instructions given by the Court repeatedly referred to agreements "express or implied" *and this very phrase had met with approval by Lessig's counsel* as entirely sufficient and adequate at the instruction conference. Thus (R. 931, 932):

> "The Court: Well, now, as to 39, I suppose that you want some modification of the word 'agreement', don't you?
> Mr. Keith: Yes, Your Honor.
> The Court: Express or implied.
> Mr. Keith: Express or implied. I think that is the language of the Sinclair case."

Then after the instructions were given, counsel asserted that "I don't think the jury has a clear understanding of what an implied agreement really is." R. 1041. But this was the precise phrase of Lessig's own instruction 7 (C.T. 166), and a court "must ascribe to the jury a reasonable knowledge of the meaning of the English language." *Rogers v. Southern Pacific Co.*, 172 C.A. 2d 493, 498, 342 P.2d 258, 261. It need not define words and phrases which are familiar to one of ordinary intelligence (*Milwaukee Mechanics Ins. Co. v. Oliver*, 139 F.2d 405, 407 (5 Cir.); *Atchison, Topeka & Santa Fe Railway Co. v. Preston*, 257 F.2d 933, 937 (10 Cir.)), and the words "express or implied" fall in this category. *McQuillen v. Meyers*, 213 Iowa 366, 241 N.W. 442, 445. The emptiness of this claim of error is apparent when it is recalled that the court's charge permitted the jury to hold Tidewater liable *without finding any agreement whatever*, simply if it "attempted to control prices charged to the public".

Requested Instruction 8A (C.T. 172): This was a request for a peremptory instruction that "Tidewater has unlawfully controlled retail prices of dealers". It was a request for a directed verdict for plaintiff and it would have been plain error to give it.

Requested Instructions 8B and 8E (C.T. 173, 176): By these, Lessig asked the Court to tell the jury that it *"is* unlawful" for Tidewater to grant dealer aid on condition that a dealer fix a

price "as directed" by Tidewater (8B) or on condition that a price sign be posted (8E). By the instructions reviewed at pp. 39-40 above, the court instructed that any attempt to control resale prices would be illegal if they had occurred. The vice of requested instructions 8B and 8E is that they *assumed* and charged as a fact that Tidewater did the acts.[37] These were controverted charges and, as we have seen, the jury found, on more than sufficient evidence, that the alleged acts had not occurred. Instructions which assume, as uncontroverted, facts in dispute are improper and rightly refused. *Supra*, p. 36, ¶ 4. Lessig himself received dealer aid[38] despite his going his own way on prices and his refusal to post a price sign (See pp. 14-16, *supra*), and there was not a syllable of evidence that any dealer was refused dealer aid for failure to post a sign.

(b) No Error Was Committed in Giving Instructions 15, 24 or 24A.

Instruction 15 (C.T. 89, R. 1007-1008): This instruction advised the jury that no claim was made in this case that Tidewater illegally combined, conspired or contracted *with any other oil company or corporation,*—that is to say, no horizontal conspiracy—and therefore such was not an issue in the case. Count Two of the complaint (C.T. 11-20) had originally alleged a conspiracy between Tidewater and other oil companies, but that count had been dismissed before trial (C.T. 69, lines 23-25), and no error is here claimed in respect of that action. Contrary to the assertion in Lessig's brief that he objected (O.B. 63), his only statement to the trial court which could possibly be related to this instruction was (R. 1044):

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37. Lessig argues as to 8B that there was error in failing to instruct "that *it would be* unlawful" to grant dealer aid conditioned on a price (O.B. 41) and urged the trial court as to 8E "that *it would be* an unlawful practice" to require signs. R. 1042. But this was not what these instructions said.

38. Lessig received over 170 days dealer aid in 1956, 1957 and 1958 i.e., for nearly a one-half year out of 3 years. P. Ex. 77.

". . . I do think that the Court should tell the jury that Tidewater is engaging in practices which in effect require these *dealers* to agree to uniform prices and that *that* is the kind of combination that the Court so finds in this action."

But this was not an objection to the instruction given. *Supra,* p. 35, ¶ 1a. At best it was an argument that the Court should give a peremptory instruction that there was an unlawful *vertical* conspiracy. No such an instruction was ever tendered and it would have been error to give it. Lessig does not now argue that instruction 15 was an erroneous statement about the issues of the case. He simply argues that the instruction was "unnecessary", that "plaintiff was entitled to a full and complete statement" and that there was a "combination as a matter of law" between Tidewater "and the coerced dealers". O.B. 111. The complaint as the case went to trial contained no averment of conspiracy, and the first matter settled at pretrial was that no claim of conspiracy was involved. Thus, C.T. 50, 52:

"Mr. Haas: Well, then, I take it from what you are saying that the Lessig case as respects count one is not a conspiracy case?

Mr. Keith: That is right. Contracts—

Mr. Haas: You do not allege that the defendant Tidewater has conspired with anyone in count one?

Mr. Keith: That's right."

No claim of conspiracy was set up in plaintiff's Pre-Trial Statement of Contentions. C.T. 55-59. As noted at p. 56, *infra,* the trial court advised in advance of trial that it would be necessary to adhere to the pre-trial statement of contentions, and Lessig never asked to be relieved of that ruling. Yet despite these prior proceedings, Lessig's counsel at the trial examined concerning Tidewater's pricing practices in relation to those of other oil companies. R. 158-159, 179. He cannot complain that the trial court took steps to prevent the jury from being confused. The instruction said nothing whatever about vertical conspiracies with

dealers, and had Lessig wished an instruction on that subject it was his duty to submit one. *Supra,* p. 37, ¶ 5.

Lessig finally argues that the instruction "immunized" the contracts between Tidewater and its TBA suppliers (O.B. 111), whatever that means. Lessig urged no such ground below (*supra,* p. 36, ¶ 1c), and it suffices to say that there is no evidence about contracts between Tidewater and any TBA supplier other than contracts whereby Tidewater bought TBA.[39]

Instruction 24 (R. 1015): This advised the jury that it was not unlawful for Tidewater to inform Lessig of its opinion that his retail prices were so high as to be likely to cause him to lose sales and customers. Lessig's only objection to the instruction when given was that it was not "based upon any evidence." R. 1032. But Lessig's brief now claims error on the ground that there *was* such evidence! Thus (O.B. 99):

> "Mr. Weaver said nothing about losing sales or customers to Mr. Lessig (R. 681); nor did Mr. Finn (R. 682-683) nor did Mr. Nichols or Mr. Thompson (R. 684-685); nor did Mr. Coleville (R. 685). *But Mr. C. R. Clark, District Marketing Manager of Tidewater, did!* He asked Mr. Lessig how he 'expected to sell gasoline at such a high price!' (R. 687)." (Emphasis in the original.)

An appellant cannot overturn a jury verdict on a ground exactly opposite to that asserted below. *Supra,* p. 36, ¶ 1c. The ground of objection stated below is now conceded to be bad.

Lessig's brief argues that this instruction was a judicial comment "that the Clark-Lessig conversation specifically was perfectly lawful." O.B. 99. This is not so. The only evidence of what Clark said is Lessig's own testimony. According to Lessig, Clark did, *inter alia,* tell Lessig that his prices were so high that loss of sales and customers was likely. Clark's saying that much was

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39. Lessig's brief asserts that "these contracts were basic proof of the existence of Tidewater's program to require dealers to buy only TBA authorized or sponsored by it." O.B. 111. This Court need only look at the contracts (P. Ex. 43, 45, 66) to see that there is nothing in them remotely supporting such a description. Moreover, since Lessig bought what he wanted when and where he wanted, the whole subject is irrelevant.

not improper. Whether Clark said anything *more* the Court did not say, one way or another, but left for the jury to decide in the light of the instructions that Tidewater could not cancel leases to require adherence to its price directions. *Supra*, p. 40.

Lessig's further arguments are that other instructions would have been in order if requested. But they were not requested. It is argued that lawful acts "lose that character when they become constituent elements of an unlawful scheme" (O.B. 98), "that price discussions may take place . . . only without any unlawful intent, plan, purpose or effect" (O.B. 99), and that "the jury was not told" these principles. O.B. 99. This may or may not be good law. It is enough that Lessig proposed no such instructions, although he had six weeks to request whatever additional instructions seemed called for. *Supra*, p. 37.

Instruction 24A (C.T. 100-101, R. 1015-1017): This advised the jury of California statutes regulating the form of signs used to advertise gasoline prices. Here again, Lessig's objection was not that the instruction was incorrect. It was that it "unnecessarily emphasizes the state law . . . which has no application to this action". R. 1038. But Lessig himself injected the subject of signs into the case; indeed with the first dealer witness he called. R. 57. His counsel then went into Tidewater's manufacture and distribution of gasoline price signs through six more witnesses. R. 124, 232-236, 429, 496, 558-561, 684. From this he sought below, and seeks here, to find something sinister. If a jury is asked to draw inferences from facts, it must have them in their factual context, and the factual context of service station price signs in California includes the California statutes. On examination by Lessig's counsel it was testified that many dealers requested Tidewater to furnish signs (R. 560), that there was a state law regulating the form of such signs (R. 558), and that as a practical matter Tidewater had to provide signs because "we couldn't conceive that a thousand dealers or more could put up a sign that would meet with this law without going to a great deal of cost and trouble." R. 558. The jury thus had to know what the statutes prescribed.

Lessig argues that the jury should have been told that the "real issue" was whether signs were utilized to "control" retail prices and that "State law may not be used as a subterfuge for price fixing" (O.B. 101), and that the jury was not instructed on the California Unfair Practices Act or the Cartwright Act. O.B. 101. But Lessig tendered no instructions on any of these matters (*supra*, p. 37, ¶ 5), and supposed violations of the statutes last named were outside the issues and beyond the Court's jurisdiction.

2. ON THE CLAIM THAT LESSIG WAS "UNABLE" TO BUY TBA FROM OTHERS.

Lessig asserts error in the refusal of one instruction (requested instruction No. 9) and in the giving of seven others, Nos. 23, 28, 28B, 28D, 32, 34 and 38. We first show that Lessig's contentions were fully stated to the jury, and that the instructions were more favorable to Lessig than warranted by law.

Lessig's theory was that his relationship with Tidewater respecting TBA was either an exclusive dealing arrangement condemned by Section 3 of the Clayton Act or a tying agreement denounced by Section 1 of the Sherman Act. C.T. 177-179; R. 980. The jury was specifically so instructed. R. 1010. They were also instructed of Lessig's claim that: "he was prevented from freely dealing in" TBA manufactured or distributed by competitors of Tidewater (R. 1009); that Tidewater "makes it clearly understood, and enforces by inspection and reporting, and utilization of short term leases with the probability of cancellation, the condition that these TBAs are purchased from Tidewater or authorized distributors and no one else" (R. 1009); that Tidewater "intended to gain complete control over the business of lessees or dealers of Tidewater products so as to prevent the free exercise of business judgments by these dealers" (R. 1009); that Tidewater "utilizes its leases to provide short term cancellation clauses so as to allow it to use the threat of cancellation to effectuate restraints of trade" R. 1009. These contentions having been told the jury once, they were then told to the jury again (R. 1012):

"As to the alleged exclusive dealings and illegal tie-in arrangements involved in the case; it is plaintiff's contention that defendant restrained his freedom to trade and deal in certain petroleum products, tires, batteries and accessories.

The plaintiff asserts that defendant requires dealers to acquire products known as TBAs exclusively from Tidewater. *This is accomplished,* it is claimed, *by both written agreements and demands from Tidewater enforced by understandings extracted at the time the lease or sales agreements are entered into,* and enforced by threat of lease cancellation."

The jury was also told of the Sherman Act's purpose to preserve free competition (*supra,* p. 39) and (R. 1010-1011):

"Section 1 of the Sherman Act condemns *all* contracts or *agreements* in restraint of trade. Thus it prohibits agreements express *or implied* which require customers of a manufacturer to purchase or acquire unreasonably other articles manufactured or distributed by the manufacturer in order to obtain a desired product manufactured by the same manufacturer or distributor. The article desired is the tying article and the article required purchased to obtain it is called the tied article.

It is unlawful for a manufacturer of petroleum products such as Tidewater to lease service stations or sell Tidewater petroleum products *on condition* that the dealer buy substantial amount of tires, batteries and accessories from it or its distributors.

A tying agreement is defined as 'an agreement by a party to sell one product but only on the condition that the buyer also purchase a different (tied) product, at least agrees that he will not purchase that product from another supplier. Where such conditions are successfully exacted competition on the merits with respect to the tied product is inevitably curbed.'

In other words, the law has been violated if the defendant compels his customers to purchase *a quantity* of one product when they seek to buy another, the desired product. *It is the restrictive nature of the agreement not the exclusivity which is objectionable."*

The Court further instructed that Tidewater "could not lawfully superimpose onto its leases limitations which required . . . that the lessees purchase a substantial amount of TBAs from Tidewater" (R. 1012), that it "could not utilize cancellation of leases of the threatened possibility of cancellation of leases to force upon its lessees restrictions as to the type of TBA products handled" (R. 1012) and that "restraints of trade include restraint in the free exercise of judgments by those engaged in trade or business". R. 1012-1013. Section 3 of the Clayton Act was first stated to the jury in abbreviated form (R. 1006) and then *read to the jury in its entirety*. R. 1045, 1046.

The jury was further instructed that it was not limited to "the bald statements of witnesses", but was "permitted to draw, from facts which you find have been proved, such reasonable inferences as seem justified in the light of your own experience". R. 997.

(a) No Error Was Committed in Refusing Requested Instruction 9 (C.T. 177).

In the face of these sweeping instructions, Lessig scrabbles for error in the refusal of his proposed instruction number 9. O.B. 45. The effort fails for several reasons.

Requested instruction 9 is long and complex, consisting of *nine* paragraphs and over 370 words. The bulk of it was amply covered by other instructions given and digested above, and the Court was not required to charge in counsel's language. *Supra,* p. 36, ¶ 2. Very little of it is now claimed by Lessig to have been left uncovered by other instructions. In his brief, Lessig complains about the refusal of this instruction in that it contained a statement that the alleged agreement might be based "on all the circumstances and facts attending the issue" and that the understanding might be "oral". O.B. 93. To be sure, buried in the mass of verbiage of this proposed instruction there are such references But their substance was certainly covered by the instructions given and reviewed above. In its instructions on both the Sherman Ac (R. 1010, line 13) and the Clayton Act (R. 1013, line 23) the Court's instructions referred to agreements "express or implied"

as well as to the claim of "understandings extracted at the time the lease or sales agreement are entered into" (R. 1012, lines 12-13), a plain reference to Lessig's testimony respecting an oral agreement. Indeed, in objecting to the refusal of instruction 9 counsel confessed "I do believe that portions of it [Instruction no. 9] were given". The Court responded "I think the portions omitted of No. 9 were both repetitive and in part unintelligible". R. 1041. At this juncture, it was counsel's duty to point out specifically the non-repetitive portions, if there were any, for, as stated in *Palmer v. Hoffman,* 318 U.S. 109, 119:

> "In fairness to the trial court and to the parties, objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error."

But at the trial Lessig pointed to no omissions. His entire objection was simply this: "I would respectfully object to the Court's not giving all of plaintiff's No. 9." R. 1041. This, however, is not compliance with Rule 51. *Supra,* p. 36, ¶ 1b. The very purpose of Rule 51 is to silence the kind of afterthought search for error Lessig here engages in.

Lessig's only other argument respecting this instruction is that the Court did not tell the jury "that Tidewater violated the Sherman and Clayton Act if it had required its dealers to buy virtually all of their *petroleum products and oil supplies* from Tidewater, and such practices affected a substantial amount of commerce." O.B. 93. The sixth paragraph of instruction 9, a peremptory instruction, was directed to this subject, but the matter was fully covered by reading to the jury Section 3 of the Clayton Act in its entirety.[40] Furthermore, it would have been error, for at least three reasons, to have given this sixth paragraph, and that

40. Neither the *Standard Stations* case, 337 U.S. 293, on which Lessig relies, nor any other case, holds that total requirements contracts are *per se* violations of the Sherman Act as the instruction states. Furthermore, if such contracts do not violate Section 3 of the Clayton Act they do not violate the narrower prohibitions of the Sherman Act. *Tampa Electric Co. v. Nashville Co.,* 365 U.S. 320, 335.

error vitiates all claims Lessig makes here respecting the refusal of instruction 9. *Supra,* p. 36, ¶ 3.

First, the sixth paragraph is unintelligible, as the trial court observed (R. 1041), and makes no reference to *interstate* commerce.

Second, it would have been error to give the sixth paragraph because Lessig *claimed no damage* from an agreement requiring dealers to buy virtually all *petroleum and oil* products from Tidewater. His exclusive dealing contention was that he sustained damages from an alleged inability to buy *accessories* distributed by others. Complaint, para. 27(b), C.T. 10. His only claim as to gasoline was that damages flowed *not* from any supposed "inability" to buy from others, but from inability "to fix and establish his own retail price." Complaint, para. 27(a), C.T. 10. He made no attempt to prove that he even wished to buy gasoline from someone else.[41]

Third, the sixth paragraph of proposed instruction 9 was erroneous, because *Tampa Electric Co. v. Nashville Co.,* 365 U.S. 320 has made clear that exclusive dealing contracts are *not* unlawful merely because large amounts of merchandise and dollars are involved. The test is not, as Lessig proposed, whether a "substantial amount of commerce" is affected, but whether there is a foreclosure of competition in a substantial *share* of the line of commerce involved in the *relevant market.* 365 U.S. at 327, 328. "It follows," the Court said, "that a mere showing that the contract itself involves a substantial number of dollars is ordinarily

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41. Lessig was not the Attorney General, authorized to challenge all of Tidewater's business dealings. As stated in Simpson v. Union Oil Company, ... F.2d ..... (9 Cir.), 1963 Trade Cas. para. 70,612, par. 77,506:

> "It is clear that the private litigant in a suit charging violation of the antitrust laws stands in a different position than the government in an antitrust action. In a government action, there need be presented only a violation of the laws and damage to individuals need not be shown. The private litigant must not only show the violation of the antitrust laws, but show also *the impact of the violations upon him and damage to him resulting from the violations* of the antitrust laws."

of little consequence." 365 U.S. at 329. Lessig relies on the *Standard Stations* case, 337 U.S. 293, but as stated in *Curly's Dairy, Inc. v. Dairy Cooperative Association,* 202 F. Supp. 481, 484 (D. Oregon), the *Tampa Electric* case has narrowed *Standard Stations* to its own facts.[42]

It may be gilding the lily to note that the seventh and eighth paragraphs of instruction 9 were also erroneous for similar reasons. These paragraphs would apply the same improper standard to supposed exclusive TBA understandings as the sixth paragraph sought to apply to gasoline, ignored the requirement of *interstate* commerce, and contained an unintelligible reference to "Sections 1 and 3 of the Clayton Act". Furthermore, there is no evidence whatever of the total amount of TBA sold anywhere. All the record shows is that many thousands of persons, including Sears Roebuck, Montgomery Ward, and even drug stores engage in this business. R. 340-343.

b) No Error Was Committed in Giving Instructions 23, 28, 28A, 28B, 28D, 32, 34 or 38.

Instruction 23 (C.T. 98, R. 1011): This advised the jury of California statutes requiring gasoline pumps and tanks to be labelled and prohibiting the dispensing through them of gasoline of a brand other than that marked on the equipment. Lessig's

42. Since paragraph 6 of proposed instruction 9 went too far, we do no more than note that the evidence here would not even bring the case within a correct enunciation. In *Tampa Electric,* the Court was at pains to point out that the *Standard Stations* case involved contracts with stations comprising *16%* of the retail outlets in the *relevant market.* 365 U.S. at 328-329. Here, there is no evidence whatever of the percentage of the total number of gasoline retail outlets in any market made up by Tidewater stations. In the *Standard Stations* case, Standard's share of gasoline sales in the relevant market was 23% (337 U.S. at 295); here there is not even evidence of what constitutes the market, and the only evidence of share is that "on the West Coast" Tidewater does about 6½% of the business in gasoline. R. 286. In the *Standard Stations* case, 6.7% of the gasoline in the market flowed under Standard's exclusive contracts. 337 U.S. at 295. Since Tidewater sells gasoline to many persons who are not service station dealers (R. 206, 209-213), as well as to service station dealers with whom it has no contracts at all, (R. 139, 150), far less than the 6½% it sells on the West Coast flows under its dealer contracts.

argument here is essentially the same as that concerning instruction 24A, discussed at pp. 45-46, *supra.*

It is not claimed that instruction 23 incorrectly states the law. It is plainly correct. Cal. Bus. & Prof. Code §§ 20840, 20849-20851; *Serve Yourself Gas, etc. Association v. Brock,* 39 Cal. 2d 813, 821, 249 P.2d 545, 550. As in the case of instruction 24A, Lessig's sole objection was that the instruction was "unnecessary to the issues raised in this action." R. 1038. Had Lessig's counsel confined himself to *those issues,* the instruction would not have been proposed. But counsel went afield to confuse or inflame the jury by suggesting that the dealer contract required Lessig to buy all his gasoline from Tidewater. E.g. R. 150-151, 809-810, 967. One of the innuendoes was that the jury could infer a requirement on Lessig to buy all his gasoline from Tidewater from the fact that he did so. The State statutes are part of the factual context, and by virtue of them, in order lawfully to handle gasoline acquired from others, Lessig would either have had to install a separate set of tanks and pumps or to relabel those already at the station. The jury was entitled to know this fact in order to be equipped to draw sound inference about why Lessig apparently did not buy any gasoline elsewhere.[4]

Instruction 28 (C.T. 105, R. 1018): This advised the jury that Tidewater was entitled to urge dealers to buy TBA from it, and to "express disappointment" when it found a dealer buying TBA from someone else. The instruction is plainly correct. "Of course a seller may attempt to persuade a buyer to purchase his product rather than those of his competitors". *Osborne v. Sinclair Refining Company,* 286 F.2d 832, 836 (4 Cir.). Salesmanship is no

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43. We say "apparently" because there was no testimony on the subject although Lessig's records of gasoline sales correspond to a high degree with Tidewater's records of gasoline deliveries.

As for Lessig's further argument (O.B. 105) that this instruction conflicts with the *Standard Stations* case, little need be said. No such objection was urged below, and therefore it cannot be assigned as error. *Supra,* p. 3, ¶ 1c. Furthermore, it is specious. The State law does not purport to prevent a dealer from buying whatever gasoline he chooses, but simply protects the public from fraudulent substitution.

denounced by the law. As said in *McElhenney Co. v. Western Auto Supply Company,* 269 F.2d 332, 338 (4 Cir.):

> ". . . it was Western Auto's policy to have its associated retail stores push its own products and . . . it frowned upon their handling of competing goods . . . . But so far as the complaint shows it exacted no agreement. . . ."

Expressing disappointment when one buys from another is the other side of the coin of urging him to buy your product, and is a far cry from Lessig's postulate (O.B. 100, 101) of "telling" someone "not to buy other products" and from "denying to dealers the right to deal with other suppliers".

Lessig's further argument that the instruction "was not supported by the record", (O.B. 99) is not only untrue (R. 651, 652) but no such objection was made below. *Supra,* p. 36, ¶ 1c. As for his final argument that, *if* Tidewater succeeded in selling *all* its dealers *all* their TBA it would be in *per se* violation of law (O.B. 101), it is enough to say that there is not a flicker of evidence of that salesman's Valhalla in this case.

Instruction 28A (C.T. 106, R. 1018): This told the jury that Tidewater might lawfully authorize only merchandise bought from it to be placed on its credit cards. This is plainly correct. Can anyone imagine any reason why an oil company should assume credit risks and expenses in connection with merchandise or transactions with which it has no possible connection? Having some regard for common sense, Lessig did not urge otherwise below, but limited his objection to the assertion that the instruction *"was not a complete statement"* (R. 1039), and that *"Although the antitrust laws will not specifically condemn the manner in which Tidewater handled credit cards,* the antitrust laws *would* specifically condemn how these credit cards were handled *if* they were part of a program to require dealers to handle TBAs exclusively". R. 1039. This concedes that the instruction was correct as far as it went, but urges that it was incomplete. That the present grievance is about alleged incompleteness is also apparent from the argument made in the brief that "the jury should have been

advised" and "instructed" of Lessig's various theories. O.B. 103. But Lessig neither requested nor submitted any further instruction, although he had ample time to do so. He may not now question the absence of further instruction. *Supra,* p. 37, ¶ 5. As held in *Metropolitan Life Ins. Co. v. Talbot,* 205 F.2d 529, 533 (5 Cir.):

> "If the defendant desired a more specific charge than this, it was its duty, not merely to ask for such a charge generally, but to tender the requested charge to the trial judge in writing and ask him to give it."

In fact, nothing in the record would support Lessig's theories about credit cards. No such claims were asserted in the complaint (C.T. 1-11), or in Lessig's Pre-Trial Statement of Contentions (C.T. 55-59), or in Lessig's proposed instructions. C.T. 158-191. The undisputed evidence was this: The dealers turned in their copies of the tickets reflecting credit card sales, which were accepted by Tidewater as cash. R. 338. If the customer paid the charge, that was the end of the matter, irrespective of the goods or services furnished by the dealer. R. 338, 339. If the customer did not pay, the credit ticket was examined. If the goods or services were shown on the ticket to be of a kind not authorized to go on the credit card, the dealer was charged back. R. 340. But if the ticket read merely for example, "tires" or "batteries", there was no charge-back and, knowing this, the dealers prepared the tickets in this manner. R. 340. The proportion of credit card purchases charged back to dealers was *one-tenth of one percent* (R. 340), and there is no evidence that Lessig was ever charged back for any TBA sale.[44]

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44. Lessig's brief asserts that Tidewater obtained rebates from its TBA suppliers on sales by Tidewater dealers (O.B. 103), citing P. Ex. 56 which has nothing to do with the subject. The relevance of this assertion eludes us, but in any case it is not true. Tidewater received additional discounts from some of its TBA suppliers when *Tidewater* sold TBA to *other wholesalers*. This was simply Tidewater's profit in inter-wholesaler transactions. R. 285, 286. Exemplars of Tidewater's reports to its TBA suppliers made to obtain these discounts are in evidence (P. Ex. 42, 44, 49-51), and show on their face sales by Tidewater to other wholesalers.

Instruction 28B (C.T. 107, R. 1018-1019): This advised the jury that no claim was asserted in the case that Tidewater's policy in classifying its dealers so as to charge different prices for TBA was illegal, and that therefore, in determining Lessig's TBA claim, "you are instructed that Tidewater's practice in this connection was entirely lawful". Lessig's objection to this instruction, stated immediately after his objection to instruction 28A, was in three sentences. R. 1039.

The first was: "I think the same objection may be lodged with respect to 28B." Since instructions 28A and 28B dealt with two different subjects, this objection was without meaning unless it meant to say that instruction 28B was incomplete, as the arguments of Lessig's brief suggest. If that was the objection, it was incumbent on Lessig to proffer a further instruction. *Supra,* p. 37, ¶ 5. The Court invited him to do so in these words: "If you think that instruction requires some augmentation, submit an instruction". R. 955. Counsel did nothing.

The second sentence of Lessig's objection was: "I think the evidence shows that contrary to what is stated in the instruction, that there was a discriminatory TBA arrangement". R. 1039. This misunderstood the instruction. The court did *not* tell the jury that there was not a "discriminatory TBA arrangement". The instruction did not advise the jury respecting the evidence; it delineated the issues. It simply told the jury that Lessig had made no claim in the case that Tidewater's policy was illegal, for this was not a Robinson-Patman Act case.

Lessig's brief now argues that he "did complain" of discriminatory pricing practices, referring to *testimony* given at the trial. O.B. 107. No such objection was voiced below. *Supra,* p. 36, ¶ 1c. Moreover, it is a play on words. As noted, the instruction did not comment on the evidence but delineated the issues. The complaint (C.T. 1-11) contains no hint of price discrimination in the sales of TBA; the offenses charged are alleged violations of "Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act, 15 U.S.C. 14". C.T. 4, lines 25-26. Lessig's Pre-Trial Statement of

Contentions (C.T. 55, lines 27, 28) contains no suggestion of discriminatory TBA prices. Faced at pre-trial conference with the usual vacillations of counsel (C.T. 63-68), albeit nothing was said about Robinson-Patman, the Court gave fair warning by stating: "I am going to require the plaintiff to adhere to the pre-trial statement which is presently on file." C.T. 68. As already noted, Lessig never sought to be relieved of this ruling. It is too late to try, on appeal, to convert this action, for the first time, into a Robinson-Patman case. A claim that "the classification system of Tidewater was shown to be discriminatory in violation of the Robinson-Patman Act and the Clayton Act" (O.B. 108), is a wholly different lawsuit from that tried below.

The third sentence of the objection to instruction 28B was that it was "an incorrect statement of the law." R. 1039, line 23. This preserves nothing for review, for it does not point out wherein an instruction is erroneous. *Apperwhite v. Illinois Central Railroad Company,* 239 F.2d 306, 310 (8 Cir.); *American Fidelity & Casualty Company v. Drexler,* 220 F.2d 930, 935 (5 Cir.); *Baltimore & Ohio R. Co. v. Commercial Transport Inc.,* 273 F.2d 447, 449 (7 Cir.); *Palmer v. Hoffman,* 318 U.S. 109, 119.

Instruction 28D (C.T. 109, R. 1018): This advised the jury that it was not unlawful under the antitrust laws for Tidewater to introduce to its dealers representatives of manufacturers from whom Tidewater buys TBA, and that those laws did not require it to introduce representatives of manufacturers from whom Tidewater does not buy. As in many other instances, Lessig's objection was not that the instruction was incorrect but that it was "incomplete", and that "Tidewater could not introduce dealer representatives (sic) as part of an exclusive dealing arrangement" R. 1039. But, as in the other instances discussed above, Lessig proffered no additional instructions on these theories, although having ample time to do so. *Supra,* p. 37, ¶ 5.

Lessig's own testimony demonstrates that the introduction of manufacturers' representatives was for entirely lawful purposes. Thus (R. 667, 668):

"Q. [By Mr. Keith] Could you state whether or not you were solicited at these occasions to purchase the articles that were represented by the representative of the manufacturing company?

A. Yes, sir.

* * * * * * *

Mr. Keith: Q. Would each representative, one from Tidewater and one from the manufacturer, motivate you to buy the merchandise, sir?

A. Yes, sir.

The Court: What do you mean by "motivate", Mr. Keith.

Mr. Keith: That's the term that Tidewater uses, sir.

The Court: How do you use it? What do you mean by "motivate"?

The Witness: I would say solicitation of merchandise.

The Court: What do you mean by "solicitation"?

The Witness: To try to get them to sell you this particular merchandise.

The Court: Isn't that what every salesman does?

The Witness: Yes, sir, they do."[45]

Instructions 32 and 34: Instruction 32 (C.T. 113, R. 1017) rew a distinction between a dealer's simply buying TBA from 'idewater and an *advance* commitment to do so. After this in-:ruction was given, Lessig did not object thereto as incorrect ut only as possibly unclear in that the words "in advance" used ıere, and in the same context in instruction 34 (C.T. 115, R. 019), were "not clear . . . whether it was made in advance of

45. At O.B. 102 Lessig cites *F.T.C. v. The Goodyear Tire & Rubber o. and The Atlantic Refining Co.,* Dkt. No. 6486, Trade Reg. Rep., .T.C. Complaints, Orders, Stipulations, 1960-1961, para. 29,426. It is relevant to anything under discussion. It was a proceeding charging not ıy violation of the Sherman or Clayton Acts, but an "unfair method of ɔmpetition" under Section 5 of the Federal Trade Commission Act, a :ction cognizable only by the Commission. Moreover, the practice there ıvolved was a so-called "sales commission method" of merchandising BA, which has nothing to do with this case. Under that method, the oil ɔmpany does not buy and resell TBA as Tidewater does, but receives a ɔmmission for inducing its dealers to buy merchandise from another. ɔunsel's theory of brief writing is that if any practice whatever of any l company has been assailed anywhere, this is water for his wheel.

going into the property or in advance of his buying such merchandise." R. 1035. But at the instruction conference (*supra,* p. 37), the following occurred when instruction 32 was discussed (R. 928):

"Mr. Keith: 32 is *all right.*
The Court: 32 is agreeable?
Mr. Keith: *All right.*
The Court: All right."

While there was no obligation on counsel to voice objections to instructions at this conference, counsel could not there *affimatively approve* an instruction as "all right" and then complain of its being given. *Morissey v. United States,* 70 F.2d 729 (9 Cir.), cert. den. 293 U.S. 566; *Orenstein v. United States,* 191 F.2d 184, 193 (1 Cir.); 88 C.J.S., Trial, § 414.

Furthermore, a mere reading of instruction 32 shows that the objection of lack of clarity is without merit. Since it speaks solely in terms of buying merchandise, "in advance" means in advance of buying. Lessig's argument is not only a specious afterthought, but his counsel recognized that it was of no consequence, for in the very breath of the objection he said *"the evidence does show that it [the alleged agreement] was made in advance."* R. 1035.

Counsel again showed, in connection with instruction 39, that he considered the matter of no importance. That instruction (C.T. 121, R. 1011-1012) is not attacked here although it also contained, in the same context, the phrase "in advance." At the instruction conference Lessig's counsel asked and received two revisions to instruction 39, viz., that the word "agreement" be modified with the prefatory words "express or implied" and that a reference to Lessig's having the burden of proof be deleted. R. 931-933, 1011-1012. He said nothing whatever about the phrase "in advance". To argue now that this phrase in instructions 32 and 39 is "highly prejudicial" (O.B. 107) trifles with the Court.

Instruction 38 (C.T. 120, R. 1020): This advised the jury that Lessig "also claims that he and Tidewater were parties to an illegal tying agreement" and "Specifically he claims that Tidewater

eased the service station to him and agreed to sell gasoline to ıim only on his agreement to buy substantial quantities of TBA rom it". At the instruction conference the following occurred (R. 931):

> "The Court: . . . Is 38 an accurate statement of your claim?
>
> Mr. Keith: *That is correct. I have no objection to that.* It is understood unless—(remarks inaudible to the reporter). I would rather have 'upon condition', but I won't make much point about it."

Having told the court that instruction 38 accurately stated his laim, it was too late for counsel to object that it was "an incorect statement" and that "What we do claim is that in order to ;et a station we had to agree to buy TBA and he was so instructed." R. 1035.

Nothing in instruction 38 is inconsistent with the theory that .essig "had to agree", for whether or not he "had to", the claim vas that he did become a party to an agreement. Conversely, if it s now argued that Lessig did *not* claim an *agreement,* the TBA laim vanishes from the case because agreement is a *sine qua non* nder both Section 1 of the Sherman Act (*Nelson Radio & upply Co. v. Motorola,* 200 F.2d 911, 914 (5 Cir.), cert. den. 45 U.S. 925) and Section 3 of the Clayton Act. *Leo J. Meyberg o. v. Eureka-Williams Corp.,* 215 F.2d 100 (9 Cir.); *McElhenney o. v. Western Auto Supply Co.,* 269 F.2d 332, 338 (4 Cir.). Moreover, the jury was fully aware of Lessig's claim that he was forced" to agree. In lodging objection to this instruction counsel aid: "the claim is that we were required to order to obtain the ease—However, *you did cover that in your instructions based pon the plaintiff's instructions".* R. 1036, lines 14-17.

Lessig's brief argues that this instruction raised a question of *ari delicto.* O.B. 60. It did no such thing. An instruction on *pari elicto* was requested by Tidewater and refused. C.T. 142. Inruction 38 gave no charge on the law, but merely described what essig was contending.

C. Relative to Damages.

Lessig complains of the refusal of his requested instructions 18, 19, 20 and 21. His contention is that the court "refused to allow the jury to base damages on the illegal lease cancellation" and "limited damages to the loss of profits made while plaintiff was on the premises." O.B. 35, para. (f). Thus no error is asserted about the damage instructions relative to his claim of "inability" to set his own gasoline prices or to buy TBA. Lessig confines this quarrel to the lease cancellation, and, as to that there is nothing to his contention.

As shown, the jury was instructed respecting the cancellation claim, and was told that a cancellation for the reason Lessig alleged would be illegal. *Supra,* pp. 5, 39-40. On damages, the court first read to the jury from 15 USC § 15 authorizing the recovery of damages by anyone injured in his business or property by reason of *anything* forbidden by the antitrust laws. R. 1006-1007. It then gave instructions dealing with damages allegedly suffered on account of the TBA and price-fixing claims. R. 1021, lines 9-24. But the instructions did not stop there. The very next instruction given was (R. 1021, 1022):

> "The purpose of the law of damages is to place a party in as good a position as he would have enjoyed but for the wrong done."

This advised the jury that Lessig should be awarded any damages suffered as a result of an illegal cancellation as is apparent from Lessig's brief, when he states (O.B. 117):

> "The purpose of the law of damages is to place the party in as good a position as if the wrong had not occurred. As to Mr. Lessig *that rule would allow him the losses occasioned by the wrongful cancellation. . . .*"

Precisely so, and precisely so was the jury instructed. But even this is not the whole of it.

The jury was then instructed that "damages are proximately caused by illegal conduct whenever it appears that damages were either a natural or a reasonably probable consequence of such

legal conduct" (R. 1022), that in arriving at an amount "you hould *include* all damages suffered by the plaintiff because of ost profits" (Id.), and that the jury might find that Lessig had suffered damage to his business or property *such as* a loss in rofits." Ibid. The jury was then advised that in determining amages they "should consider all the evidence in this case" and *you may specifically base your award of damage . . . on the estimony of expert witnesses.*" R. 1023. Only two experts, Mr. Veiner and Dr. Vance, testified. Vance's entire testimony was irected to the question of losses suffered by Lessig as a result f the cancellation, and that portion of Mr. Weiner's testimony hich related to damages was a comparison of Lessig's earnings s a Tidewater dealer with his subsequent earnings. R. 843, . Exs. 104, 105. Indeed, during the examination of Mr. Weiner he trial court stated, in the jury's presence, that "if Lessig ad any . . . legitimate complaint about the loss of prospec- ve earnings from the operation of the station during the pe- od that would have remained on the lease absent cancellation, s damage would be the difference between what he actually rned and what he could have earned had he retained posses- on of the station." R. 845. Thus, when the court in its damage struction specifically directed the jury's attention to the expert stimony, it meant only one thing, viz., that any damages proxi- ately caused by an illegal cancellation were recoverable. Im- ediately following this reference to the expert testimony, the urt reread 15 USC § 15 (R. 1023) and advised the jury that if mages were awarded they should be such as were "reasonably cessary to compensate the plaintiff for *any* injury to his busi- ss or property proximately cause by *one or more* of the viola- ns of the antitrust laws which the plaintiff has alleged." R. 023-1024.

There can be no doubt that the jury knew that Lessig was claim- g damages caused by a lease cancellation alleged to be illegal, d that they also knew that they could award such damages if ey found any to exist. Here, as elsewhere, Lessig's complaint is

simply that he could not put the precise language he desired int the trial judge's mouth.

IV. ANSWER TO MISCELLANEOUS CONTENTIONS.

A. The Trial Court Was Not Guilty of Misconduct.

The last resort of an appellant with a frivolous case is to attac the trial judge, and Lessig does so—an unwarranted attack on trial judge who, with remarkable patience, permitted Lessig t meander in all directions for nine days in a case which shoul have been tried in one-third that time, if not terminated by sun mary judgment before trial. Lessig asserts that the trial judg "weighted its charges" in favor of Tidewater (O.B. 63), he referring to the instructions heretofore discussed individually an in passing, to other instructions to which no objection was mac below.[46] Nothing is added by the epithet "exceeded the prop boundaries of judicial conduct." O.B. 80, 123. Lessig also charg the trial judge with "usurping the function of the jury" by inte rogating witnesses and making comments (O.B. 80), and hea up 28 instances of alleged misconduct. R. 16, 23, 29, 56-59, 75-7 96, 116, 127, 184-185, 204-205, 231, 272-275, 306, 311-312, 32 374, 399-400, 616, 622, 664-670, 674, 695, 723, 735, 777-77 807-808, 835-836, 878. O.B. 80-81. Yet *in only one instance did object.*[47] As stated in *Kettenbach v. United States,* 202 Fed. 37 384 (9 Cir.), cert. den. 229 U.S. 613, "This fact alone is sufficie to dispose of the contention which is made in this court."

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46. These are instructions 20 (C.T. 94, R. 1014), 21 (C.T. 95, 1014), a modified form of 22 (C.T. 96, R. 1015), 28C (C.T. 108, 1014), and the instructions on damages at R. 1021-1024. O.B. 64. It is a asserted that the cancellation claim was "made confusing and uninte gible" by the alleged "mixing" of instructions at R. 1009-1010 and 1013. O.B. 63, 64. In order to avoid extending this already long brief, do not discuss these claims, but rely on the settled rule that in a civil c the failure to object to an instruction below precludes attack here. *Su* p. 35, ¶ 1a.

47. The one objection was to an entirely proper question put t witness by the Court as "invading the province of the jury". R. 878.

Lessig has no conception of the function of a United States District Judge. As stated in the *Kettenbach* case, *supra,* at p. 385:

> "The trial judge in a federal court is not a mere presiding officer. It is his function to conduct the trial in an orderly way with a view to eliciting the truth, and to attaining justice between the parties. It is his duty to see that the issues are not obscured, that the trial is conducted in a proper manner, and that the testimony is not misunderstood by the jury, to check counsel in any effort to obtain an undue advantage or to distort the evidence, and to curtail an unnecessarily long and tedious or iterative examination or cross-examination of witnesses. He has the authority to interrogate witnesses, and to express his opinion upon the weight of the evidence and the credibility of the witnesses."

ccord: *Jordan v. United States,* 295 F.2d 355, 356 (10 Cir.); *urd v. Todd-Johnson Dry Docks,* 213 F.2d 864, 866 (5 Cir.); *orwood v. Great American Indemnity Co.,* 146 F.2d 797, 801 3 Cir.).

As for the trial court's interrogation of witnesses, we quote *mon v. United States,* 123 F.2d 80, 83 (4 Cir.), cert. den. 314 S. 694:

> *"This is precisely what he should have done* . . . the function of a federal trial judge is not that of an umpire or of a moderator at a town meeting. He sits to see that justice is done . . . it is his duty to see that a case on trial is presented in such way as to be understood by the jury, as well as himself. *He should not hesitate to ask questions for the purpose of developing the facts; and it is no ground of complaint that the facts so developed may hurt or help one side or another."*

ccord: *Griffin v. United States,* 164 F.2d 903, 904-905 (D.C. r.).

From time to time the trial court also sought, by questions to ounsel, to ascertain the respective positions of the parties, and equired as to the relevance and purpose of various lines of quiry. This was both "wholly within the bounds of propriety" *ussell v. Monongahela Railway Company,* 262 F.2d 349, 353 (3

Cir.)) and essential to enable both the Court and jury to unde stand the issues.

Precisely the type of attack made here was made with infinite more justification—and rejected—in *Union Carbide and Carbo Corporation v. Nisley,* 300 F.2d 561 (10 Cir.), an antitrust cas

> "The appellants complain generally of the instructions being weighted in favor of the appellees and against t appellants. They earnestly contend that rulings in the cour of the trial, together with his instructions, so influenced t jury so as to deprive them of a fair trial. There are, to sure, instances in the record in which the trial court indicat with some emphasis his view of the evidence, and even critical attitude toward counsel for appellants. And, it m be fairly said from the tenor of the whole record that t jury was impressed with the views of the court concerni the merit of the plaintiffs' case, and the demerits of t defendants' case. But, as we have recently said, 'a jud presiding over a * * * federal court is not a mere umpi He has both the responsibility of assuring the proper condu of the trial and the power to bring out the facts of the cas Jordan v. United States (10 CA—Sept. 1961), 295 F.2d 3 To that end, an expression of the court's views with resp to the evidence and conduct of counsel within proper lim is permissible, provided the jury is given to understand th they are free to form their own opinion of the facts a apply them to the law." (p. 586)

On the very first day of the trial the trial court stated to t jury (R. 65):

> "The function of the jury is to determine the facts of t case from the evidence as the jury weighs the evidence. T function of the Court is to give the law to the jury, to applied to the facts as the jury may determine the facts to If during the course of the trial any indication is given as my personal views of any evidence which comes in either the form of testimony or in the form of documentary dence, that is something which should be completely regarded by you. There is no desire or intention on the p of the Court to intrude upon the sole responsibility of jury to find the facts in the case."

his principle was repeatedly stated in the instructions. The rors were advised that they were "the sole judges of the facts" R. 994), "the sole judges of the credibility of the witnesses and e weight their testimony deserves" (R. 998) and (R. 1004):

> "The law of the United States permits the judge to comment to the jury on the evidence in the case. Such comments are only expressions of the judge's opinion as to the facts; and the jury may disregard them entirely, since the jurors are the sole judges of the facts.
>
> "During the course of a trial, I occasionally ask questions of a witness, in order to bring out facts not then fully covered in the testimony. Do not assume that I hold any opinion on the matters to which my questions related. Remember at all times that you, as jurors, are at liberty to disregard all comments of the Court in arriving at your own findings as to the facts."

hen followed the further admonition that, "as stated before, e jurors are the sole judges of the credibility of all witnesses and e weight and effect of all evidence." R. 1005.

The Claims About Monopolization.

Lessig claims error in the giving of Instructions 37 and 46 about onopolization. What Tidewater is supposed to have attempted monopolize has never been made clear, either in his Complaint, his Pre-Trial Statement of Contentions, or now, in his brief. me vague and curious notions of law seemed to be entertained, hich it would be of academic interest to dissect, but it would be imposition on the time of the Court to do so, *because the jury's rdict made the subject moot.*

Instruction 46 (R. 1008) told the jury that Tidewater had not onopolized or attempted to monopolize trade or commerce. ssig's basic fallacy in discussing the subject is to forget that no ssible violation of law by Tidewater is a concern of his unless inflicted damage on him. *Simpson v. Union Oil Company,* ..... d ..... (9 Cir.), 1963 Trade Cases, para. 70,612, p. 77,506. re the jury's verdice negatived *everything* by which Lessig imed to have suffered damage. Its verdict found that Tidewater

(1) did *not* limit the prices at which he sold gasoline, (2) did *no* limit or prevent him from obtaining TBA wherever he wished (3) did *not* cancel his lease for any improper reason, and (4) in flicted *no* damage on him at all. Assuming that somewhere in th ambient blue Tidewater attempted to monopolize some product– unspecified by Lessig—in some market—also unspecified by him– it had no consequence on him.[48] That is the end of the matter.

Lessig's criticism of Instruction 37 fails for the same reaso Indeed, it is even weaker—if that were possible. Instruction 37 (R 1019) told the jury that "there is no evidence in this case fro which you could find that the effect may have been to tend to creat a monopoly in TBA for Tidewater." But the instruction then co tinued, *explicitly,* to put to the jury the issue whether the effe may have been to "substantially lessen competition in TBA." Th jury's verdict found there was no such possible effect. This nece sarily found no tendency to monopolize. There may be "a substa tial lessening of competition" without reaching the point monopoly, but there never can be monopolization which does n constitute a substantial lessening of competition. The lesser viol tion is a necessary component of the greater and the jury havi found the nonexistence of the lesser, Lessig has not been prej diced by an instruction that there was no evidence of the greate The objection made by Lessig to Instruction 37 when it was giv was *not* that it was incorrect, but that it "has a prejudicial effe on the plaintiff" (R. 1035). On the contrary, the only "prejudici

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48. Attempt to monopolize requires a dangerous probability of succe i.e., that if unchecked, monopolization will result. *Sunkist Growers, I v. Winckler & Smith Citrus Products Co.,* 284 F2d 1, 26 (9 Cir.). A though this is conceded by Lessig (O.B. 117), his proposed instruction the subject (No. 13, C.T. 183) wholly ignored this requirement. Inqu about the probability of monopolization cannot even begin without spe fication of the goods or services involved and what is the "relevant marke *United States v. Du Pont & Co.,* 351 U.S. 377, 380. Lessig's brief vagu states that Tidewater "possesses the dangerous probability" because "it 6.5% of the West Coast market." O.B. 117. Not only is "West Coast m ket" not defined in the record, but the 6.5% relates to gasoline sold the entire West Coast. But there has never been any claim in this case t Lessig suffered any damage relative to gasoline except from inability set his resale prices and, inconsistently, from cancellation of his lease cause he did set his own price, and the jury negatived each of these clai

ffect" it could have had was in favor of Lessig because by its ontiguous but different treatment of "tendency to monopolize" nd a possibility of a mere substantial lessening of competition, ne jury was vividly told that it could find a violation of the law n the basis of evidence showing a lesser restraint of trade than ight otherwise have been assumed.[49]

Conclusion

Lessig had a full and fair trial. His claims were utterly without oundation, and sham on his own testimony. Despite his attempts o inflame the jury against a large oil company by thrusting into ne record evidence of alleged mistreatment of other Tidewater ealers which he knew he could not relate to himself, the jury eturned a verdict for Tidewater. That verdict was correct and ne judgment should be affirmed.

Respectfully submitted,

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49. It may be superfluous to note that Lessig's citations are wholly relevant, involving cases where the defendants, by conspiracy, controlled rge shares of the delineated market. *Continental Co. v. Union Carbide,* 70 U.S. 690, 698 ("99% of the ferro-vanadium and vanadium oxide sold n this county"); *United States v. Yellow Cab Co.,* 332 U.S. 218, 224 "86% of the Chicago market, 15% of the New York City market, 100% f the Pittsburgh market and 58% of the Minneapolis market"); *American obacco Co. v. United States,* 328 U.S. 781, 796 ("over 68% of all domes- c cigarettes . . . over 63% of the smoking tobacco and over 44% of the hewing tobacco."); *Times Picayune v. United States,* 345 U.S. 594, 612 "around 40%); *Union Carbide and Carbon Corporation v. Nisley,* 300 .2d 561, 573 (10 Cir.) ("almost 100% of the ferro-vanadium market"); *Inited States v. Eastman Kodak Co.,* 226 Fed. 62, 79 (W.D.N.Y.) "between 75 per cent. and 80 per cent. of the entire trade"). Neither .T.C. *v. Beech-Nut Packing Co.,* 257 U.S. 441, nor *Klor's v. Broadway- ale Stores,* 359 U.S. 207, has anything to do with attempts to monopolize. he former deals with resale price maintenance and the latter with group oycotts, both denounced by Section 1. As noted, *supra,* p. 51, there is no vidence of Tidewater's share of TBA sales in any market.

I certify that, in connection with the preparation of this brief I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

RICHARD HAAS